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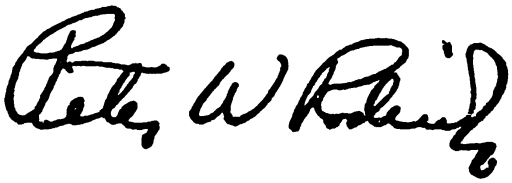
Foreword

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

In October 1973, the Committee on the Judiciary issued as a Committee Print, *Impeachment: Selected Materials*, a 718-page volume of materials regarding the constitutional bases for the impeachment of officers of the United States.

It was my hope at that time that those materials, some of them previously scattered in select libraries and in some cases out of print for more than a century would be more readily accessible to Members of Congress and to a larger segment of the American community.

The demand for those volumes has been enormous, and the Committee continues to receive daily innumerable requests for additional information regarding the procedures and mechanics of the impeachment process in the House of Representatives and in the United States Senate. For that reason, I am pleased to transmit a second volume of materials, these gleaned exclusively from Hinds' and Cannon's Congressional *Precedents*. Together in one volume for the first time, they offer an extended historical and parliamentary manual of how the impeachment process works in the United States.



January 7, 1974

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Nature of Impeachment*

1. Provisions of the Constitution. Sections 2001–2003.[1]
2. Rules of Jefferson's Manual. Sections 2004, 2005.
3. Trial proceeds only when House is in session. Section 2006.[2]
4. Accused may be tried after resignation. Section 2007.[3]
5. As to what are impeachable offenses. Sections 2008–2021.[4]
6. General consideration. Sections 2022–2024.[5]

2001. "Treason, bribery, or other high crimes and misdemeanors" require removal of President, Vice-President, or other civil officers from office on conviction by impeachment.—The Constitution, in Article II, section 4, provides:

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

2002. Impeachments are exempted from the constitutional requirement of trial by jury.—The Constitution, in Article III, section 2, provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

2003. Cases of impeachment are excluded by the Constitution from the offenses for which the President may grant reprieves and pardons.—The Constitution in Article II, section 2, provides:

> The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2204. The English precedents indicate that jury trial has not been permitted in impeachment cases.

The Commons are considered, in English practice, as having in impeachment cases the function of a grand jury.

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* Hinds' Precedents, vol. 3, p. 307 (1907).

[1] Discussion as to right to demand jury trial. Sec. 2318 of this volume. Impeachment in relation to the courts. Sec. 2314 of this volume. A Senator is not a "civil officer." Secs. 2361, 2318 of this volume. Argument that the power is remedial rather than punitive. Sec. 2510 of this volume. May a civil officer be impeached for offenses committed prior to his term of office? Sec. 2510 of this volume.

As to the impeachment of territorial judges (secs. 2486, 2493) and officers removable by the Executive (secs. 2501, 2515). Is impeachment justified by ascertainment of probable cause? Sec. 2498.

[2] See also sec. 2462 of this volume.

[3] See also secs. 2317, 2444, 2459; but in other cases proceedings have ceased after resignation. Secs. 2489, 2500, 2509, 2512.

[4] As to the impeachment of citizens not holding office. Secs. 2056, 2315.

Nature of impeachment discussed. Sec. 2270; also in the Chase trial, secs. 2356–2362; in the Peck trial, secs. 2379–2382; in the Johnson trial, secs. 2405, 2406, 2410, 2418, 2433; in the case of Watrous, sec. 2498.

The argument that impeachment might be only for indictable offenses. Secs. 2356, 2379, 2405, 2406, 2410, 2418.

Abuse and usurpation of power as grounds of. Secs. 2404, 2508, 2516, 2518.

Authority of Congress to make nonresidence of a judge an impeachable offense. Sec. 2512.

[5] An officer threatened with impeachment may decline to testify. Sec. 1699.

Impeachment and ordinary legislative investigations contrasted. Sec. 1700.

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In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Jury. In the case of Alice Pierce (1 R., 2) a jury was impaneled for her trial before a committee. (Seld. Jud., 123.) But this was on a complaint, not on impeachment by the Commons. (Seld. Jud., 163.) It must also have been for a misdemeanor only, as the Lords spiritual sat in the case, which they do on misdemeanors, but not in capital cases. (Id., 148.) The judgment was a forfeiture of all her lands and goods. (Id., 188). This, Selden says, is the only jury he finds recorded in Parliament for misdemeanors; but he makes no doubt if the delinquent doth put himself on the trial of his country, a jury ought to be impaneled, and he adds that it is not so on impeachment by the Commons; for they are in loco proprio, and there no jury ought to be impaneled. (Id., 124.) The Ld. Berkeley (6 E., 3) was arraigned for the murder of L. 2 on an information on the part of the King and not on impeachment of the Commons; for then they had been patria sua. He waived his peerage, and was tried by a jury of Gloucestershire and Warwickshire. (Id., 126.) In 1 H., 7, the Commons protest that they are not to be considered as parties to any judgment given, or thereafter to be given, in Parliament. (Id., 133.) They have been generally and more justly considered, as is before stated, as the grand jury, for the conceit of Selden is certainly not accurate that they are patria sua of the accused, and that the Lords do only judge but not try. It is undeniable that they do try, for they examine witnesses as to the facts, and acquit or condemn according to their own belief of them. And Lord Hale says "the peers are judges of law as well as of fact" (2 Hale P.C., 275), consequently of fact as well as of law.

2205. Under the parliamentary law an impeachment is not discontinued by the dissolution of Parliament.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament. (T. Ray., 383; 4 Com. Journ., 23 Dec., 1970; Lord's Journ., May 15, 1791; 2 Wood., 618).

2006. It was decided in 1876 that an impeachment trial could only proceed when Congress was in session.

Instance during an impeachment trial wherein a Member of the Senate called on the managers for an opinion.

On June 19, 1876,[6] in the Senate sitting for the impeachment trial of William W. Balknap, late Secretary of War, the counsel for the respondent asked for a postponement of the trial until some time in the next November.

Thereupon a question arose as to whether or not the trial might proceed when the House of Representatives was not in session, and Mr. John J. Ingalls, a Senator from Kansas, asked for an opinion from the managers for the House of Representatives.

Mr. Manager Scott Lord said:

Perhaps, Mr. President, it will be sufficient for the managers to say in that regard that the managers are not agreed on that question. Some of us have a very fixed opinion one way, and other managers seem to have as fixed an opinion the other way; and not being agreed among ourselves we perhaps ought not to discuss the question until we can come to some agreement.

I will say further, Mr. President and Senators, that the question which is presented by the Senator has not been fully considered by the managers; it has not been very much discussed by them, but it has been sufficiently discussed to enable us to see that there is this difference of opinion. I think myself that when the question is fully discussed by the managers they will come to a conclusion on the subject unanimously; but perhaps one differing with me might think we should come unanimously to a different conclusion from that which I entertain.

[6] First session Forty-fourth Congress, Record of Trial, p. 173.

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I will say for myself that I have no doubt of the power of this court to sit as a court of impeachment after the adjournment of the Congress.

* * * * * * *

I ought to say in regard to the opinion which I have expressed that I predicate that opinion upon the action of both the Houses. I think that in order to authorize the sitting of this court beyond all question either the House or the Congress should vote to empower the managers to appear before this court in the recess or absence of the House.

* * * * * * *

I ought to say in furtherance of the view which I have presented, that the question has been settled in the State of New York, the State in which I reside and I, of course, would naturally be influenced somewhat by the decision. In the case of Judge Barnard the trial was had at Saratoga after the adjournment of the legislature, and in the recent impeachment trial in Virginia the same course was taken—the impeachment was not tried until after the adjournment of the legislature. I am also reminded that as far back as 1853 when Mr. Mather, a canal commissioner, was impeached in New York, he was tried after the legislature adjourned. In regard to the English authorities they seem on the whole to warrant the proposition that the House of Lords may proceed as a court of impeachment after the adjournment of the Parliament.

Soon after,[7] while an order was pending providing that the trial should proceed on July 6, Mr. Oliver P. Morton, of Indiana, proposed to add thereto as an amendment the following:

Provided, That impeachment can only proceed in the presence of the House of Representatives.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, the words "in the presence of the House of Representatives" were stricken out and the words "while Congress is in session" were inserted.

Thereupon Mr. Morton asked and obtained leave to withdraw his amendment.

Thereupon Mr. Roscoe Conkling, of New York, offered the proviso again:

Provided, That impeachment can only proceed while Congress is in session.

This proviso was agreed to, yeas 21, nays 19.

Thereupon Mr. Oliver P. Morton proposed to amend by adding the words, "and in the presence of the House of Representatives."

Mr. Eli Saulsbury, of Delaware, proposed to amend Mr. Morton's amendment by adding the words, "or its managers."

Mr. Saulsbury's amendment was disagreed to without division; and Mr. Morton's amendment was disagreed to by a vote of yeas 9, nays 28.

So it was

Provided, That the impeachment can only proceed while the Congress is in session.

The reasons actuating the Senate in coming to this decision do not appear from Senate proceedings, as the debates were in secret; but in a verbal report made to the House of Representatives by the Chairman of the Managers, Mr. Scott Lord, of New York, this statement appears:[8]

The plan of the managers on the part of the House has been this: To induce the Senate, as a court if impeachment, to allow Congress to adjourn and then sit as a court to carry on the case. But there are two reasons against that which

[7] Senate Journal, pp. 957, 959.
[8] Record, p. 3871.

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render it conclusive that the Senate will not do so. The first is that many Senators doubt the power of the Senate to sit as a court of impeachment after the adjournment of Congress. The second, and the really practicable reason, is that it will be found impossible to keep a quorum of the court together after the adjournment of Congress.

2007. The Senate decided, in 1876, that William W. Belknap was amenable to trial notwithstanding his resignation of the office before his impeachment for acts therein.

In the Belknap trial the managers and counsel for respondent agreed that a private citizen, apart from offense in an office, might not be impeached.

Discussion as to effect of an officer's resignation after the House has investigated his conduct, but before it has impeached.

On May 4, 1876,[9] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such argument discuss the question whether the issues of fact are material and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

On the first question, whether or not the respondent was amenable to trial for acts done as Secretary of War, notwithstanding his resignation, the argument naturally divided itself into three branches.

1. May a private citizen be impeached, irrespective of whether he has held office or not?

2. May a private citizen who formerly held an office be impeached for acts done as an incumbent of that office?

3. Assuming that a person may not be impeached after he is out of office for acts done in office, does a resignation, after proceedings for impeachment begin, confer immunity?

As to the first question, may a private citizen be impeached, Mr. Montgomery Blair, of counsel for the respondent, said:[10]

Upon the first question I do not know how the managers are to maintain the jurisdiction of this court upon any other principle than that which was asserted in the Blount case, which was that "all persons are liable to impeachment" (Annals of Congress of 1797, vol. 2, p. 2251), because, as was alleged there all persons are liable in England, the country from which we borrow the proceeding, and to whose laws and usages we must therefore look for the extent of its application. But as the court on that occasion overruled this doctrine, and the decision has been acquiesced in for seventy-eight years, the managers ought not now to expect this court to overrule it.

And Mr. Manager Scott Lord, speaking for the House of Representatives, said:[11]

The learned counsel, Mr. Blair, suggested that we should be driven to the position of asserting that a citizen who had never held office was impeachable. We claim no such thing. We claim first, and admit, that the authorities have settled that a mere citizen can be impeached; and if the authorities had not settled it, the Constitution, not by express words, but by is intent, does exclude the idea of impeachment as against a mere private citizen.

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[9] First session Forty-fourth Congress, Senate Journal, p. 928; record of trial, p. 27.
[10] Record of trial, p. 28.
[11] Page 34.

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Mr. Matt H. Carpenter, of counsel for the respondent, after an exhaustive discussion of authorities, said: [12]

In Blount's case, where the question I am discussing was first presented to this court, Messrs. Bayard and Harper, managers, understanding the task before them, grappled with the subject, and maintained the broad ground that the power of impeachment under our Constitution reached to every inhabitant of the United States, Blount, not as a Senator, but while a Senator, had committed the acts charged in the articles of impeachment. He pleaded to the jurisdiction, first, that he was not an officer of the United States when he committed the acts complained of, and, secondly, that he was not even a Senator at the time of the impeachment. It appeared from the record that he was a Senator at the time the acts were committed. The managers argued that a Senator was a civil officer. But they also contended that whether a Senator was a civil officer or not was immaterial; because impeachment was not confined to civil officers. And there was no fault in their reasoning, upon their premises. If impeachment lies against any private citizen of the United States, then Blount should have been convicted; because surely he could not interpose his senatorial character as a shield against an impeachment maintainable against any private citizen. And so the question was distinctly presented, whether or not impeachment lies against a private citizen.

The court, as is well known, decided that there was no jurisdiction. And this decision is an authoritative declaration that impeachment can not be maintained against a private citizen.

* * * * * * *

We have been unable to find any case in which a private citizen has been held subject to impeachment for misconduct in an office formerly held by him. In the Barnard case, it is true, the court held that the accused might be convicted and removed from office on account of offenses committed in a former term of the same elective office which he was holding at the time of impeachment.

In the State of Ohio. Messrs. Pease, Huntingdon, and Tod held a certain act of the legislature unconstitutional and void. At the session of the legislature 1807–8 steps were taken to impeach them therefor, but the resolution was not acted upon at that session; but at the next session steps were taken toward the impeachment of the offending judges, and articles of impeachment were reported against Pease and Tod, but not against Huntingdon, who in the meantime had been elected governor of the State, and of course had ceased to be a judge of the court. This discrimination is an authority in favor of the proposition that no man can be impeached after he is out of office. (Cooley on Constitutional Limitations, p. 160, note 3.)

(2) The main force of the argument was expended on the second question, whether or not a private citizen who has formerly held an office may be impeached for acts done as an incumbent of that office. The question of the right to impeach a private citizen was argued only for its relation to this second question.

Mr. Montgomery Blair, of counsel for the respondent, began the argument with a review of the nature of impeachment in America and England, and continued: [13]

This settles the principle upon which impeachment must be exercised. It is strictly confined to the cases expressly enumerated in the Constitution, as much so as any other court established by the Federal Constitution.

And this brings me to the consideration of what are the cases enumerated by this Constitution as within the power of impeachment. There is no other enumeration except what is contained in the fourth section of the second article, as follows:

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

[12] Pages 39–42.
[13] Page 29.

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The enumerated cases of persons, therefore, against whom this court can entertain articles of impeachment are "the President, Vice-President, and all civil officers of the United States;" not persons who have been President, Vice-President, or civil officers, but only persons who can be at the time truly described as President, Vice-President, or as civil officers, and who can "be removed from office on impeachment and conviction of treason," etc. "If there must be a judgment of removal," says Story, "it would seem to follow that the party was still in office;" but it is not necessary to rely upon this inference, plain and necessary as it is, because the only persons specified as subject to impeachment are officers, and it would be equally plain that only officers were amenable to impeachment if nothing was said in the section about removal, and it were simply "that the President, Vice-President, and all civil officers shall be subject to impeachment for and conviction of treason, bribery," etc., because it is only by these descriptions as officers that they are made subject to impeachment. Hence the only question before the court is whether the term "officer" can be applied to a person not at the time in the holding of an office.

And this has been the accepted construction. From the day when Blount was tried until now no attempt has been made to impeach a private citizen, and that not because there have not been plenty of proper subjects for impeachment if the law had authorized the proceeding against ex-officers. Within a few years past it is notorious that a number of officers who were under investigation and who were threatened with impeachment resigned to avoid it, and the proceedings against them were abandoned. Several judges were among the number, all whose names I do not now recall, and it is not necessary to do so, because the Senate knows to whom I refer, who resigned their places and thereby arrested the proceedings. So in New York, where the high court of impeachment is composed of the judges of the court of appeals and the senate, and the provisions of whose constitution, if not in identical words with those of the national Constitution, are substantially the same, an impeachment was dismissed against Judge Cardozo, within a few years, on the presentation of his resignation. The judiciary committee of the house of representatives of that State, composed of persons who will, I understand, be recognized by some of the managers as among the ablest lawyers of that State, reported against the power of impeachment of any person not actually in office. The language of the resolution in Fuller's case (the case referred to) is:

"That no person can be impeached who was not at the time of the commission of the alleged offense and at the time of the impeachment holding some office under the laws of the State."

This resolution and the accompanying report form part of the report of the trial of George G. Barnard, page 158.

I have examined all the constitutions of all the States with reference to the provisions therein contained on the subject of impeachment. With two exceptions, they correspond in substance with the national Constitution; and I have not learned that any impeachments against ex-officers have taken place under those constitutions.

Mr. Blair next cited opinions of the framers of the Constitution, and the comments of Judge Story, saying:[14]

All of the reasons upon which the proceeding was supposed to be necessary were applicable only to a man who wielded at the moment the power of the Government, when only it was necessary to put in motion the great power of the people, as organized in the House of Representatives, to bring him to justice. It is a shocking abuse of power to direct so overwhelming a force against a private man. It may be deemed by some of small moment, because it can only effect his disfranchisement; but the effect is to dishonor him, and it is simply tyranny to put this man's honor in peril by the application of that overwhelming force. The great authors of England, as well as the great commentator on our Constitution mentioned, hold that impeachment ought only to be brought into action to arrest the wrongdoing of another power in the Government. The arena of impeachment is in fact a place in which a controversy takes place between the high powers of the Government. The only theory upon which it can be justified is to enable the people, massed and organized in their representative houses, to assail their oppressors, armed with the power of the Executive and the patronage and prestige which that gives them. Do you seek to prostitute that power

[14] Pages 30, 31.

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to the oppression of a private individual, wasting his means by an action that, as this author says, has invariably ruined every private man who has been the subject of it in Great Britain?

Mr. Matt H. Carpenter held that there were two theories in regard to impeachment—one that the proceeding was so broad that private persons might fall within its reach, as in England, and the other that impeachment "was only a proceeding to remove an unworthy public officer." And he declared that one of these theories must be accepted, and that there was no middle ground. He then proceeded at length to cite authorities [15] to show that a private citizen might not be impeached, and then said: [16]

Bearing in mind this method, when we read that the "House of Representatives shall have the sole power of impeachment, and the Senate the sole power to try impeachment;" and learn from the debates in the convention that impeachment was intended as a method of removal from office, we naturally look elsewhere in the Constitution for the extent of this power; in other words, for the officers who may be removed by this method, which we find in section 4 of article 2, as follows:

"The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment, etc."

There is a strong implication arising from the provision that punishment in cases of impeachment shall extend no further than removal from office, or removal and disqualification, that impeachment only lies against those in office. But section 4 of article 2 is perfectly conclusive.

Consider the language of this fourth section of the second article. The President shall be removed, etc. Suppose General Jackson still alive, and to be impeached to-day for removing the deposits from the Bank of the United States? Who would preside over the trial?

Section 3 of article 1 provides:

"When the President of the United States is tried, the Chief Justice shall preside."

Suppose General Jackson living and impeached for removing the deposits. Would the Chief Justice preside? Manifestly not, because General Grant is President, and the case supposed would be an impeachment of a private citizen, and not of the President. And yet, upon the theory now maintained, that once a President is always a President for the purposes of impeachment, the Chief Justice would have to preside. This is as absurd as it would be to construe a statute giving Members of Congress the franking privilege, as giving that privilege to every one who had been a Member of Congress.

The Constitution does not authorize the impeachment of certain crimes—that is, crimes committed in offices—but it authorizes an impeachment of certain persons, described by the class to which they belong; that is, civil officers of the United States.

I may assume therefore that the purpose for which the power of impeachment was incorporated in the Constitution will be observed by this court, in exercising the jurisdiction which the Constitution confers. And upon this subject the debates in the convention are not only satisfactory, but absolutely conclusive.

Before passing from the subject of these debates let me say that considerable opposition was developed against embodying this power in the Constitution. Those who opposed it did so upon the ground that conferring the power would make the President a subservient tool of Congress and destroy the proper equilibrium of the three departments. On the other hand, it was urged that without the impeachment clause it would be in the power of the President, especially in time of war, when he would have large military and naval forces at command, and public moneys at his disposal, to overthrow the liberties of the people. Near the close of the debate Mr. Morris said his views had been changed by the discussion, and he expressed his opinion to the effect that—

[15] Pages 38, 39.
[16] Page 40.

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"The Executive ought to be impeached. He should be punished, not as a man, but as an officer, and punished only by degradation from his office."

This was the only debate upon the general subject of impeachment. Thus it will be seen that those who favored and those who opposed incorporating the power in the Constitution, contemplated the impeachment of officers while holding office.

Mr. Jeremiah S. Black, also of counsel for the respondent, said:[17]

We must then fall back on the one question whether an officer who has resigned is subject to the power of impeachment, or whether he is to be regarded as a private citizen after he goes out, and therefore amenable only to the courts.

The words are "the President, Vice-President, and all civil officers." Who is the President? If that means an ex-President, a person who has once held the office of President, but whose term has expired or who has resigned, then the same interpretation must be given to the other words, and the words "the Vice-President and all civil officers" may include all persons who have held office at any period of their lives. When we speak about the President, do we ever refer to anybody except the incumbent of that office? A half-grown boy reads in a newspaper that the President occupies the White House; if he would understand from that that all ex-Presidents are in it together he would be considered a very unpromising lad.

The managers would not assign that absurd meaning to any other part of the Constitution. Where it is provided that the Vice-President shall preside in the Senate, they know very well that nobody is included but the actual incumbent. Statutes have been passed declaring that the Members of Congress shall have certain privileges, such as franking letters and receiving an annual compensation out of the Tresaury. Did anybody ever claim that this extended to old Members retired from public life? Any law which declares that public officers as a class shall be entitled to pay as privileges would be confined to those persons in office, and no sensible man would think of a Constitution extending it to former officers. When, therefore, the Constitution says that all civil officers may be impeached, it is a violation of common sense to hold that the power may be applied to a late Secretary of War or other person who does not at the time actually hold any office at all.

The Constitution declares that when the President is impeached the Chief Justice shall preside. The question has been propounded repeatedly, and by several Senators, who would preside if an ex-President was impeached? I admit that that is a puzzle. The puzzle arises out of the absurdity of impeaching an ex-President. Our friends on the other side are so hampered by their own theory that they are obliged simply to decline answering. There is one answer and only one consistent with their logic, and that is this: That when an ex-President is impeached an ex-Chief Justice ought to preside at the trial.

But then the reductio ad absurdum is furnished to their argument when they read on that the President, the Vice-President, and all other civil officers of the United States shall be removed upon conviction. The single sentence uttered by Governor Johnstone in the North Carolina convention puts this in a light so perfectly clear that it would be throwing words away to talk about it. How can a man be removed from office who holds no office? How turn him out if he is not in? The object and purpose of impeachment was removal—removal, mind you, not for a day, not for an hour, not a removal which might be rendered nugatory the next moment by his reappointment or reelection, but a permanent removal. You find an officer misbehaving himself, and you get hold of him while he is still in the possession of power. When you get your grasp upon him, you hurl him down, and give him such a pernicious fall that he can never rise again.

Removal is not only the object of impeachment, but it is the sole object. Removal and disqualification are so associated together that they can not be separated. You can not pronounce a judgment of removal without disqualifying; and you can not pronounce a judgment of disqualification without removal, because the judgment which the Constitution requires you to pronounce is a judgment of removal and disqualification—not removal or disqualification; and this is made perfectly manifest to my mind from the experience we have had in Pennsylvania. It was thought by the convention that framed our Constitution desirable that the Senate, upon conviction of an offender of this kind, should have the discretion to say that he might be removed without being disqualified; and accordingly they changed the provision which had previously been copied from the Con-

[17] Page 71.

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stitution of the United States, and instead of saying what is said here, that judgment shall extend to removal and disqualification, it says it shall extend to removal, or to removal and disqualification. The effect of that was to allow of a judgment of removal alone, but not of disqualification alone—removal alone, or removal and disqualification.

On the other hand, the managers for the House of Representatives maintained, with careful citation of authorities, that impeachment was intended to reach a public officer while in office or after he had left office. Mr. Manager Scott Lord said: [18]

Therefore we claim that the limitation of the Constitution is not as to time; it simply relates to a class of persons, and the word "officer" is used as descriptive precisely as it is used in the very statute to which the counsel referred. If it be true because the word "office" or "officer" is used in the Constitution, without saying anything about a person after he is out of office, that the defendant is not impeachable, then he can not be indicted, because the statute relating to his indictment simply speaks of him as an officer.

What is the real intent and meaning of the word "officer" in the Constitution? It is but a general description. An officer in one sense never loses his office. He gets his title and he wears it forever, and an officer is under this liability for life; if he once takes office under the United States, if while in office and as an officer he commits acts which demand impeachment, he may be impeached even down to the time to which the learned counsel, Mr. Carpenter, so eloquently referred the other day—down to the time that he takes his departure from this life.

It is supposed by many that because an officer must be removed no judgment can be pronounced without pronouncing the judgment of removal. This, it seems to me, is a very great error. If he is in office, of course under the Constitution he must be removed; but if out of office, the sentence of disqualification or some inferior sentence may be passed upon him, for the obvious reason that the sentence is divisible. This was distinctly held in the Barnard case, to which reference has been made. In that case the court proceeded unanimously to vote that he should be removed from office; but when the question came up on the other point, shall he be disqualified? several members of the court voted in the negative.

I do not see, then, any possible view in which there is difficulty; and the learned counsel on the other side will not be able to create any difficulty excepting under the claim that a person in office, having so conducted himself as to be worthy of impeachment, finding that it is impossible to escape the facts or pervert them, may, I repeat, defeat the Constitution for the purpose of preventing his punishment.

Messers. Managers George A. Jenks and George F. Hoar examined the English precedents and the history of the Constitution at length, the latter summarizing his conclusions [19] thus:

The history of the steps by which these constitutional provisions found their place, the few authorities which can be found on the subject, the narrower argument drawn from the language of the Constitution and the broader argument drawn from a consideration of the great public object to be accomplished all point the same way and bring us irresistibly to the conclusion that the power of the Senate of the United States over all grades of public official national wrongdoers, a power conferred for the highest reasons of state and on fullest deliberation, to interpose by its judgment a perpetual barrier against the return to power of great political offenders, does not depend upon the consent of the culprit, does not depend upon the accidental circumstance that the evidence of the crime is not discovered until after the official term has expired or toward the close of that term, but is a perpetual power, hanging over the guilty officer during his whole subsequent life, restricted in its exercise only by the discretion of the Senate itself and the necessity of the concurrence of both branches, the requirement of a two-thirds' vote for conviction, and the constitutional limitation of the punishment

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[18] Page 34.
[19] Page 57.

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But I think I can show to the Senate of the United States, from the history of the formation of this Constitution, that the jurisdiction conferred was complete, and that the unanimous purpose of the convention to confer the power of impeachment over everybody committing crime in office is to be found and proved by its debates, and that the clause saying that civil officers can be removed on conviction is put there as an exception to the clauses which previously had determined the tenure of those offices. In other words, the framers of the Constitution had given power of impeachment to the House, given the power of trial to the Senate, extended the power to all cases of national official wrongdoers, prescribed the mode of proceeding, the numbers necessary to convict, limited the judgment, and passed from that question.

Mr. Aaron A. Sargent, a Senator from California, asked if Members of the Senate who had in times past been civil officers of the United States were, in Mr. Hoar's view, liable to impeachment. Mr. Hoar replied:[20]

They are, undoubtedly. The logic of my argument brings us to that result, and undoubtedly they are as safe from the operation of that process practically as the newly-born infant in his mother's arms. Does anybody suppose that there is to be a two-thirds vote of the American Senate which will rake up and try and punish for political offenses, when the public judgment of this people has demanded an amnesty? The whole power to punish, the whole judgment after the offender has left office is disqualification to hold office, and that judgment is a judgment in the discretion of the Senate. Hunt in Massachusetts, a justice of the peace—the language being exactly the same as this—was sentenced simply to suspension from his office and disqualification to hold any other for twelve months. That was the case of a justice of the peace in the town of Watertown, I think, early in this century.

* * * * * * *

Let me sum up the argument, drawn from the language of the Constitution. The power of impeachment is not defined in the grant in the Constitution. It is conferred as a general common-law power. The judgment is then limited to removal and disqualification, and two-thirds required for conviction. No limit of its application to persons is inserted in the grant. But a subsequent limitation on the tenure of office is inserted, namely, the case of a removal by impeachment, to guard against the argument that officers, whose term is fixed in the Constitution, can not be removed under the power of impeachment, just as impeachment is excepted in the clause securing the right of trial by jury and in the clause conferring the power to pardon.

But suppose we grant the phrase, all civil officers, to be inserted as a definition of the persons who may be reached by this process. Is the definition to be taken to apply to them at the time of the commission of the offense or at the time of the punishment? Suppose a statute enact that all wrongdoers may be punished. Is it not clear that if they be wrongdoers when they commit the act the liability to punishment attaches? The very statute which punishes bribery would fail by this construction to reach anybody, because it is in this respect, as has already been said, almost identical with the provision of the Constitution in its description.

The provision that the judgment shall extend no further than removal from office and perpetual disqualification authorizes any lesser penalty included within those limits to be imposed at the discretion of the Senate. In Hunt's case, in Massachusetts, the sentence was disqualification for a year under a like constitutional provision.

* * * * * * *

The whole constitutional provision, so far as affects our present purpose, can be summed up in two sentences which are scarcely a paraphrase or change of the existing text of the existing law, and these two sentences I think state precisely the contentions on the one side and on the other. We say that the Constitution in substance is this: "The Senate shall have the sole power to try impeachments, and civil officers shall be removed on conviction." The counsel for the defendant would state it to be: "Judgment in case of conviction shall be removal from office and disqualification. If the defendant is willing." That is the summing up of the two propositions.

[20] Page 60.

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But the meaning of these provisions of the Constitution must be ascertained after all by a broad consideration of the great public objects they were intended to accomplish. "Never forget," says Chief Justice Marshall, in McCulloch *v.* Maryland—and that sentence is the keynote to his whole judicial power—"Never forget that it is a constitution you are interpreting."

(3) As to the third branch of the inquiry, assuming that an ex-officer may not be impeached, whether or not a resignation after proceedings begin confers immunity, there was not very extended debate. Mr. Manager Scott Lord said,[21]

I now propose to call the attention of the court to the other questions of this case referred to in the order of the Senate. The first question of the second replication is: "Can the defendant escape by dividing the day into fractions?" This question is also presented by the articles and plea. The allegation on page 5 is not denied. Therefore, as I propose to show this court by an unbroken series of decisions that the law does not permit a day to be divided into fractions in such a case as this, and if it be true that the defendant was Secretary of War on the 2d of March, on any part of that day, and therefore impeachable, then that question, perhaps, can be argued independent of this replication. I propose, now, to argue the question under the second replication. The authorities will bear upon both the plea and replication. First, I say a judicial act dates from the earliest minute of the day in which it is done.

After citing authorities, he continued—[22]

The next question presented by their replication is, Did the impeachment relate back to the inception of the proceedings by an authorized committee of the House? Whether the committee was authorized or not is a question of fact. Therefore the comments of the learned counsel relating thereto were not in order, because it is affirmed on the part of the House of Representatives that this committee had authority. If it should appear that the committee had no authority, then another principle would be invoked, and that is the principle of adoption. But it is not necessary to discuss that now, because for the purposes of this argument the authority is conceded. In regard to the principle of relation it is this: That the House of Representatives before this resignation having instituted proceedings against Mr. Belknap for the purpose of investigating these crimes and for the purpose of impeaching the defendant, when the impeachment was made it related back to the original proceeding which was instituted, as is confessed, before this resignation. When divers acts concur to a result, the original act is to be preferred, and to this the other acts have relation.

And after citing other authorities:

In this case we claim that the House of Representatives, having obtained jurisdiction of the subject-matter by instituting these proceedings against the defendant, he could no more defeat them by resigning midway than he could defeat the Constitution itself. When the House of Representatives by its solemn act impeached him of high crimes and misdemeanors, that was a judicial act, the highest judicial act that can be performed in this nation save one, and that is the act to be performed by this tribunal when it pronounces "guilty" or "not guilty" upon the proofs before it.

Therefore, we say the defendant in this case should not be allowed his dilatory plea, because these proceedings had been instituted against him long before he had resigned his office, long before he had attempted to escape the penalty due to his crime by this resignation. This impeachment is in furtherance of justice, not in furtherance of injustice. It is due to the defendant; it is due to the dead whom he claims to represent; it is due to all the associations that surround him, if he is an innocent man, that he establish his innocence in this tribunal. Therefore to hold jurisdiction in this case, to give him the opportunity to establish his innocence, or the House of Representatives to establish his guilt, is in furtherance of justice. To deny jurisdiction under these circumstances would be in furtherance of injustice.

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[21] Page 35.
[22] Page 36.

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In this case before the court the doctrine of relation prevents injustice, for it changes no rule of evidence, and does not affect the merits.

Mr. Carpenter, of counsel for respondent, argued,[23] on the other hand:

If I am right in saying that the only purpose of impeachment is to remove a man from office, when the man is out of office the object of impeachment ceases, and the proceedings must abate. There would be no further object to attain by the proceeding. Suppose the man committed suicide while his trial was progressing, would not that be good matter of abatement? Suppose he commits official suicide by resigning, why should this not have the same effect? I have attempted to show that the sole object for which the power of impeachment was given is removal from office.

There is another proposition which I intended to argue in that connection. The disqualification clause of punishment was evidently put in for the purpose of making the power of removal by impeachment effectual. After providing that the officers of the United States might be removed on impeachment, although the President could not pardon the offender convicted and removed, yet if he could reinstate him the next morning he would have substantially the power of pardon. To prevent this was the object of the disqualifying clause; which Story says is not a necessary part of the judgment. You might impose it where you had removed an officer appointed by the President whom the President could reinstate. You could stop that by fixing disability upon the officer; and that I take to have been the sole purpose of this clause.

If I am right in this position, if the man died in the middle of the trial, or if he died after finding against him, but before judgment had been pronounced, the suit would abate. Must this court go on and sentence a man after he is dead—either physically or officially dead? It is equally absurd to talk of removing a man from an office which he no longer fills, as to talk of removing a man from office after he is dead. So far as its effect upon the suit is concerned I see no difference between the case of his natural death and his official death. The suit abates because there is no further object to be attained by its prosecution.

Let me remind the Senate that there is not a writer on this subject who does not maintain that the power of impeachment was never intended for punishment.

This is conclusively shown by the fact that the party, after he is impeached, is to be indicted and punished for his crime. And it should be remarked that, if impeachment lies against one not in office, he must either not be punished at all, which would show the absurdity of the proceeding; or you must inflict the disqualification, which, Story says, you need not inflict on one removed from office.

Returning from this digression to the line of my argument, let me say that Rawle's Commentaries and the report of the Blount case were considered by Judge Story in writing his Commentaries; and he quotes from them both, but evidently disagrees with Rawle's parenthetic suggestion, and the concessions made by the counsel of Blount.

Mr. Roscoe Conkling, a Senator from New York, asked Mr. Carpenter this question:

Is there no distinction on the point of jurisdiction to try an impeachment, between the case of a resignation before articles are found and the case of resignation not till after articles, have been found?

Mr. Carpenter replied:[24]

The question put to me by the Senator from New York is very specific, and, in reply, I would say that a distinction exists between the case where a resignation precedes the exhibition of the articles and the case where a resignation comes between the exhibition of the articles and final judgment. And this court might hold that after jurisdiction had attached by exhibition of the articles, or even by the formal impeachment which precedes exhibition of articles, the jurisdiction had attached, and resignation would not prevent final judgment. Speaking, however, for myself, I still incline to the opinion that if the officer, who alone can be impeached, is out of the office before judgment of removal

[23] Page 42.
[24] Page 43.

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passes, this would abate a proceeding, which, I have endeavored to show, can only be had for the purpose of removal. It is said the law will not require a vain thing; from which I infer that the highest court in the Republic will not render a vain judgment.

Mr. Carpenter also said,[25] after citing authorities:

But against this array of authorities, showing that a private citizen can not be impeached, the managers say that Belknap was in office at the time of the impeachment. It is not denied that Belknap resigned, and his resignation was accepted by the President, at 10 o'clock and 20 minutes a. m., March 2, 1876; nor is it denied that the first proceedings in the House in relation to him took place after 3 p.m. of that day. But the managers say that, in legal contemplation, he was in office at the time of impeachment, because the law will not notice fractions of a day; and, second, that he resigned to evade impeachment, and therefore was in office for the purpose of impeachment after his resignation was accepted.

Fractions of a day! I did not suppose this case would be determined on a question of special pleading, or a fiction of law, until I heard the argument of the learned manager [Mr. Lord] yesterday. I supposed we could strike through the fog and place our feet upon the solid rock of jurisdiction. But the managers propose to hold us by a fiction. They maintain that, although the respondent had resigned, and his resignation had been accepted, nevertheless, this court must decide that he was in office all day, and until after his impeachment on the afternoon of that day, because this court can not distinguish between the forenoon and afternoon of a day.

Suppose a man is sentenced by a criminal court to be hanged at 2 p. m. of a certain day; and suppose the President pardons him at 10 a. m. of that day. Must he be hanged at 2 p. m. because the law knows no fraction of a day? We have heard of men being hanged on the gallows; hanged at the yard-arm; but we never heard of a man being hanged on the fraction of a day.

Suppose in time of war the colonel of a regiment is relieved from duty, or his resignation accepted at 9 o'clock in the morning, and at 4 p. m. of the same day the regiment is engaged in battle. Could the colonel be court-martialed because he was not at the head of his regiment at 4 o'clock?

But having answered the managers on the substance of their claim of jurisdiction, we shall not yield to their fictions.

Mr. Manager Jenks replied [26] to Mr. Carpenter:

Of the second portion of this proposition, which is concerning the collateral facts, I shall say but little, if anything, more than this: It has been considered by the chairman of the managers; he has advanced three or four propositions in support of the view that it is material to consider all the surrounding facts. One of those propositions is, that in law there is no fraction of a day. He has cited authorities to establish that; that was the general rule, that in law there is no fraction of a day. This being the general rule, an exception was introduced by the honorable counsel for the defendant, that is, that if it be necessary to subserve the purposes of justice, a court will consider the fractions of a day. Then the matter stands thus: As a rule, courts will not recognize the fractions of a day; but as an exception, if it be necessary to subserve the purposes of justice, they will recognize the fractions of a day. Hence, when the counsel cited those authorities to show that they would consider it as an exception, it was essential to show that it was necessary to subserve the purposes of justice to bring his case within the exception. He left off just where the real contest began: Is it necessary to subserve the purposes of justice that this court should recognize the fractions of a day? It seems to me that there is no necessity in subserving the purposes of justice that this court should recognize any fraction of a day. Put the question in this form: How can it subserve the interests of justice, when a defendant is charged with having surreptitiously filched from the pockets of from eight hundred to a thousand men from 10 to 25 cents every day for five years, that that defendant shall plead this as an excuse, that the ends of justice are subserved by recognizing the fractions of a day? If he had discussed this, and shown that this defendant would have been wronged did you not consider it, he would then have brought his case within the exception; but, having failed to do that, he leaves

[25] Page 44.
[26] Page 48.

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it as my colleague, the chairman, left it; that is, that the general rule, if the defendant have not brought himself within the exception, still exists, and the court will not recognize the fractions of a day.

With reference to the question of relation, that was not considered at all by the counsel for the defendant, and we shall leave it, as our chairman has left it, with you.

The Senate debated the question from the 15th to the 29th of May.[27] The debates were behind closed doors and were not reported.

On May 16[28] the following questions were submitted by Senators for consideration:

By Mr. Oliver P. Morton, of Indiana:

Is there power in Congress to impeach a person for crime committed while in office if such person had resigned the office and such resignation had been accepted before the finding of articles of impeachment by the House?

By Mr. Justin S. Morrill, of Vermont:

Has the Senate power to entertain jurisdiction in the pending case of the impeachment by the House of Representatives of William W. Belknap, late Secretary of War, notwithstanding the facts alleged in relation to his resignation?

By Mr. John Sherman, of Ohio, on May 25:[29]

Resolved, That notwithstading the resignation of William W. Belknap prior to his impeachment by the House of Representatives he is still liable to such impeachment for the misdemeanors charged in the articles presented by the House of Representatives, and his plea of such resignation is not sufficient in law to bar the trial upon such articles.

On May 29[30] the Presiding Officer announced that the proposition pending was that offered by Mr. Morton on the 16th instant. Thereupon Mr. Morton modified his proposition to read as follows:

Resolved, That the power of impeachment created by the Constitution does not extend to a person who is charged with the commission of a high crime while he was a civil officer of the United States and acting in his official character, but who had ceased to be such officer before the finding of articles of impeachment by the House of Representatives.

Mr. Justin S. Morrill, of Vermont, moved to amend the resolution by striking out all after the word "resolved," in the first line, and in lieu thereof inserting:

That the demurrer of the respondent to the replication of the House of Representatives to the plea of the respondent be, and the same is hereby, overruled; and that the plea of the respondent to the jurisdiction of the Senate me, and the same is hereby, overruled; and that the articles of impeachment are sufficient to show that the Senate has jurisdiction of the case, and that the respondent answer to the merits of the accusation contained in the articles of impeachment.

Mr. Isaac P. Christiancy, of Michigan, moved to amend the amendment of Mr. Morrill, of Vermont, by striking out all after the word "that" in the first line thereof, and inserting:

W. W. Belknap, the respondent, is not amenable to trial by impeachment for acts done as Secretary of War, he having resigned said office before impeachment.

Mr. George G. Wright, of Iowa, moved to lay the resolution of Mr. Morton on the table, and this motion was agreed to, yeas 36, nays 30.

Thereupon Mr. Allen G. Thurman, of Ohio, proposed a resolution, which was in this form, after the words "before he was impeached" had been added on motion of Mr. Roscoe Conkling, of New York:

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[27] Senate Journal, pp. 932–947; Record of trial, pp. 72–76.
[28] Senate Journal, p. 933; Record of trial, p. 73.
[29] Senate Journal, p. 939; Record of trial, p. 74.
[30] Senate Journal, pp. 942–947; Record of trial, p. 76.

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Resolved, That in the opinion of the Senate William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Mr. Algernon S. Paddock, of Nebraska, moved to amend the said resolution by striking out all after the word "resolved" and in lieu thereof inserting:

That William W. Belknap, late Secretary of War, having ceased to be a civil officer of the United States by reason of his resignation before proceedings in impeachment were commenced against him by the House of Representatives, the Senate can not take jurisdiction in this case.

This amendment was disagreed to, yeas 29, nays 37.

Then the resolution was agreed to, yeas 37, nays 29.

Mr. Thurman also presented a further resolution, which, after amendment at the suggestion of Mr. Thomas F. Bayard, of Delaware, was agreed to by a vote of 35 yeas, 22 nays:

Resolved, That at the time specified in the foregoing resolution [June 1 was fixed by a separate resolution] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught;" which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

In the final arguments Messrs. Montgomery Blair [31] and Matthew H. Carpenter [32] also argued this question.

2008. Reference to discussions as to what are impeachable offenses.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question, "What are impeachable offenses?" was discussed at length and learnedly. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [33] learnedly in favor of this definition:

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

Mr. Butler also appended to his argument [34] an exhaustive brief on the "law of impeachable crimes and misdemeanors," prepared by Mr. William Lawrence, of Ohio.[35] This view was also supported by Mr. Manager John A. Logan, of Illinois.[36] Of the Senators who filed written opinions, Mr. Charles Sumner, of Massachusetts, argued at length that political offenses were impeachable offenses.[37] So also argued Mr. Richard Yates, of Illinois.[38]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued, on the other hand, that impeachable offenses could only

[31] Record of trial, pp. 287–289.
[32] Pp. 330–334.
[33] Second session Fortieth Congress. Globe, Supplement, p. 29.
[34] Pages 41–50.
[35] Globe, p. 1559.
[36] Pages 252–254.
[37] Pages 464–466.
[38] Page 487.

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be offenses against the laws of the United States.[39] Mr. Thomas A. R. Nelson, of Tennessee, also of President's counsel, argued in the same line,[40] and Mr. William M. Evarts, of New York, also of counsel for the President, argued at length against the definition given by Mr. Manager Butler.[41] Of the Senators who filed written opinions on the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[42]

2009. Argument that the phrase "high crimes and misdemeanors" is a "term of art," of fixed meaning in English parliamentary law, and transplanted to the Constitution in unchangeable significance.—On February 22, 1905,[43] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachment, the following being among them:

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

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

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

II. PROVISIONS BORROWED FROM THE ENGLISH CONSTITUTION

Mr. Bayard said in his argument in Blount's trial (Wharton's St. Tr., 264): "On this subject, the Convention proceeded in the same manner it is manifest they did in many other cases. They considered the object of their legislation as a known thing, having a previous definite existence. Thus existing, their work was solely to mold it into a suitable shape. They have given it to us, not as a thing of their creation, but merely of their modification. And therefore I shall insist

[39] Page 134.
[40] Pages 293, 294.
[41] Pages 343, 344.
[42] Pages 439, 440.
[43] Third session Fifty-eighth Congress, Record, pp. 3026–3028.

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that it remains as at common law, with the variance only of the positive provisions of the Constitution. * * * That law was familiar to all those who framed the Constitution. Its institutions furnished the principles of jurisprudence in most of the States. It was the only common language intelligible to the members of the Convention."

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

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

The English Parliament as a whole has always been considered and styled "The high court of Parliament," which is governed by a single body of law peculiarly its own. As Sir Thomas Erskine May (Parl. Prac., pp. 71 and 72) has well expressed it: "Each house, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by a separate right peculiar to each, but solely by virtue of the law and custom of Parliament." In the words of Lord Coke (4 Inst., 15), "As every court of justice hath laws and customs for its direction—some the civil and canon, some the common law, others their own peculiar laws and customs—so the high court of Parliament hath also its own peculiar law, called the lex et consuetudo parliamenti." Blackstone (Bk. I, 163) in commenting upon the statement of Coke, that the law of Parliament, unknown to many and known by few, should be sought by all, observes that, "It is much better to be learned out of the rolls of Parliament and other records and by precedents and continual experience than can be expressed by any one man." Chitty, in commenting upon the statement of Blackstone, has said:

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

"As these words are copied by our Constitution from the British constitutional and parliamentary law, they are, so far as applicable to our institutions and condi-

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tion, to be interpreted not by English municipal law but by the lex parliamentaria. * * * Whatever 'crime and misdemeanors' were the subject of impeachment in England prior to the adoption of our Constitution, and as understood by its framers, are therefore subjects of impeachment before the Senate of the United States, subject only to the limitations of the Constitution. * * * 'Treason, bribery, and other high crimes and misdemeanors' are, of course, impeachable. Treason and bribery are specifically named, but 'other high crimes and misdemeanors' are just as fully comprehended as though each was specified. The Senate is made the sole judge of what they are. There is no revising court. The Senate determines in the light of parliamentary law. Congress can not define or limit by law that which the Constitution defines in two cases by enumeration and in others by classification, and of which the Senate is sole judge. * * * Now, when the Constitution says that all civil officers shall be removable on impeachment for high crimes and misdemeanors, and the Senate shall have the sole power of trial, the jurisdiction is conferred and its scope is defined by common parliamentary law."

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

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

The fundamental principles of English constitutional law were first reproduced in the constitutions of the several States. In the light of the construction put upon them there, they were embodied, so far as applicable and desirable, in the Constitution of the Unted States. Thus the Federal Supreme Court was called upon at an early day to interpret the immemorial formulas or "terms of art" through which the cardinal principles of English constitutional law were incorporated in our governmental systems, State and Federal. The uniform rule for construing such formulas or "terms of art" adopted at the outset has been continued in force until the present time. When, in the trial of Aaron Burr, Chief Justice Marshall was called upon to construe Article III, section 3, of the Constitution, which provides that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," he said, "What is the natural import of the words 'levying war?' and who may be said to levy it? * * * The term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of twenty-fifth of Edward III, from which it was borrowed." (Burr's Trial, vol. 2, pp. 401, 402.)

When in the case of Murray *v.* The Hoboken Land Co. (18 How., 272) it became necessary for the Supreme Court to construe the formula "due process of law," as embodied in the fifth amendment, Mr. Justice Curtis, speaking for the court, said: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Carta. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of

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law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the words."

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

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

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

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

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appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance." Thus it follows that any act of Congress which attempts to change the constitutional definition of impeachable high crimes and misdemeanors, by adding to the list some offense unknown to the parliamentary law of England as it existed in 1787, is simply void and of no effect.

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

On February 25, 1905,[44] in the Senate, sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in final argument, said:

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

Said the managers in their brief:

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

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

Judges, like all others, can be impeached for treason not committed upon the bench or in judicial affairs. They can be impeached for bribery by the strict terms of the Constitution, bribery committed anywhere, without regard to whether they were sitting upon the bench at the time. But as to other causes of impeachment I challenge the honorable managers to show me any case in history, English or American, where a judge has been impeached for any other crime or high misdemeanor except one alleged to have been committed in connection with his exercise of judicial authority. In saying that, I do not refer to some impeachment cases that have happened in States and under State constitutions, for many of the constitutions of the several States have provisions largely at variance with those of the Constitution of the United States upon this subject.

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

The statement of the honorable managers in their brief—

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

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

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

The article exhibited against John Pickering charged him with drunkenness upon the bench, and was limited to that charge, for framers of that impeachment well knew that the drunkenness of the judge was no ground for impeach-

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

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ment under the Constitution of the United States unless he carried that drunkenness upon the bench.

The articles against Pickering read:

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

That is, on the bench, while administering justice—"invoke the name of the Supreme Being, etc."

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

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

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

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

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

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

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of that impeachment provision of the Constitution, or to repeal some of those things which then constituted crimes and thereby prevent the impeachment of those who committed them.

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

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

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

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

2011. Argument of Mr. Manager Perkins that a judge may be impeached for personal misconduct.—On February 24, 1905,[45] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager James B. Perkins, of New York, in concluding argument, said in relation to the articles charging nonresidents in the district:

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

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

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

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a judge of the United States court. Such a result shows the absurdity of the position.

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

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

I shall say no more on that point, but come at once to what is the important, the great question in this case—not whether the offense is impeachable, but whether the offense was committed. It has already been suggested that a judge of the United States court is the one officer in the land who holds his office by a life tenure. He can not be removed by the people. He can not be removed by the President. Nothing but the act of God or the vote of the Senate can remove a man who holds the office of United States judge. His dignity is great; his responsibility is correspondingly great. The people who complain, the people who lack confidence in their judges, can look to the Senate and can look here alone for relief. If they can not get it here they can not get it anywhere.

2012. Argument of Mr. Anthony Higgins, counsel, that impeachable offenses by a judge are confined to acts done on the bench in discharge of his duties.—On February 24, 1905,[46] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said in final argument:

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

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

This was in respect of the judges.

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

* * * * * * *

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

* * * * * * *

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

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

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

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

* * * * * * *

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

* * * * * * *

Mr. Mason said:

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

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

Mr. Madison replied:

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

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

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

"ARTICLE V.

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

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

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

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

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

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

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

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

2013. Argument from review of English impeachments that the phrase "high crimes and misdemeanors," as applied to judicial

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conduct, just mean only acts of the judge while sitting on the bench.

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

On February 22, 1905,[47] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

The only pertinent definitions of the term "high crimes and misdemeanors," as contained in Article II, section 4, of the Federal Constitution, must be drawn (1) from the law of Parliament as it existed in 1787; (2) from the contemporaneous expositions of that law embodied in the constitutions of the several States. In order to present anything like an adequate statement of the English law of impeachment as it existed at the time in question, some account must be given of the process of growth through which it had passed prior to that time. The history of that growth is divided into two epochs, easily distinguishable from each other. The first begins with the proceedings against the Lords Latimer and Neville, which took place in the Good Parliament in the fiftieth of Edward III (1376). These proceedings are regarded by the constitutional historians as the earliest instances of a trial by lords upon a definite accusation made by the Commons. (Hallam, M. A., Vol. III, p. 56; Stubbs, Const. Hist., Vol. II, p. 431.) Not until early in the reign of Edward III was Parliament definitely and finally divided into two houses that deliberated apart; not until near the close of that reign did the Commons, as the grand jury of the whole realm, attempt to present persons accused of grave offenses against the State to the Lords for trial. At the outset, the new method of accusation was rivaled by what were known as "appeals," which have been thus defined: "It was the regular course for private persons, even persons who were not members of Parliament, to bring accusations of a criminal nature in Parliament, upon which proceedings were had." (Stephen, Hist. of the Criminal Law of England, Vol. I, 151.)

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

VII. IMPEACHMENTS IN ENGLAND: SECOND EPOCH

With the revival of the powers of Parliament in the reign of James I, impeachment was resumed as a weapon of constitutional warfare. From that time its modern history, with which this discussion is concerned, really begins. The first impeachment case to occur during the second epoch was that of Sir Giles Mompesson in 1621, the last that of Lord Melville in 1805. Including the first and last the total is 54. [Here follows the list.]

An examination of the foregoing list reveals the fact that many of the impeachments in question were directed against private individuals, it having

[47] Third session Fifty-eighth Congress, Record, pp. 3028–3031.

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

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

The earliest of the accusations which have been made against English judges have been for the crime of bribery, the crime for which Lord Bacon was impeached by the Commons in 1621. The charges against Bacon particularly set forth instances of judicial corruption by the acceptance of bribes, and in his "confession and submission" he said: "I do plainly and ingeniously confess that I am guilty of corruption, and do renounce all defense." (State Trials, Vol. II, 1106). Such cases, though rare, had occurred before Bacon's time. In the words of Sir J. F. Stephen, Coke "gives two instances in which judges were punished for taking bribes, namely, Sir William Thorpe, in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln assizes, and certain commissioners (probably special commissioners) of oyer and terminer, who were fined 1,000 marks each for taking a bribe of £4. I have elsewhere referred to the impeachment of the Chancellor Michael de la Pole, by Cavendish, the fishmonger for taking a bribe of £40, 3 yards of scarlet cloth, and a quantity of fish, in the time of Richard II. * * *

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

IX. IMPEACHMENT OF SIR ROBERT BERKLEY AND OTHER JUDGES

In 1635 Charles I announced his attention to extend the exaction of ship money to the inland counties. When the writs of that year were resisted, the judges gave answers in favor of the prerogative. When in 1636 another set of ship writs were issued, Hampden made a test case by refusing to pay the assessment on his lands at Great Missenden, and the issue thus raised was argued in November and December, 1637, before a full bench. The contention made in favor of the Crown was sustained by seven of the judges—Finch, chief justice of the common pleas; Bramston, chief justice of the king's bench; Berkley, one of the justices of that court; Crawley, one of the judges of the common pleas; Davenport, lord chief baron of the exchequer; Weston and Trevor, barons of that court. When the day of reckoning came, Finch fled to Holland, and the remaining six were im-

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peached by the Commons for their judgments rendered in favor of the royal contention, the charges being delivered to the Lords July 6, 1641. As Berkley's opinion in favor of the legality of ship money was the most emphatic, he was made the special object of attack in articles which charged him not only with the ship-money opinion, but with other acts of judicial misconduct on the bench. The nature of the accusations against him can be best explained by extracts from the articles themselves, which open with the general statement "that the said Sir Robert Berkley, then being one of the justices of the said court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England, and instead thereof to introduce an arbitrary and tyrannical government against law, which he hath declared, by traitorous and wicked words, opinions, judgments, practices, and actions appearing in the several articles ensuing."

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

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

In the reign of Charles II, Sir William Scroggs, chief justice of the king's bench, was impeached of high crimes and misdemeanors, the nature of which may be best explained by the following extracts from the articles themselves. The general accusation is "that the said William Scroggs, then being chief justice of the court of king's bench, hath traitorously and wickedly endeavored to subvert the fundamental laws, and the established religion and government of this Kingdom of England; and instead thereof to introduce popery and arbitrary and tyranical government against law; which he has declared by divers traitorous and wicked words, opinions, judgments, practices, and actions." Chief among the special charges are the following: II. "That he, the said Sir William Scroggs, in Trinity term last, being then chief justice of the said court, and having taken an oath duly to administer justice according to the laws and statutes of this realm, in pursuance of his said traitorous purposes, did, together with the rest of the justices of the said court, several days before the end of said term, in an arbitrary manner, discharge the grand jury which then served for the hundred of Oswaldston, in the county of Middlesex, before they had made their presentments, etc. * * * III. That, whereas one Henry Carr had, for some time before, published every week a certain book, entitled 'The Weekly Pacquet of Advice from Rome, or The History of Popery,' wherein the superstitutions and cheats of the Church of Rome were from time to time exposed, he, the said Sir William Scroggs, then chief justice of the court of king's bench, together with the other judges of the

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said court, before any legal conviction of the said Carr, of any crime did in the said Trinity term, in a most illegal and arbitrary manner, make and cause to be entered a certain rule of that court against the printing of said book, in hæc verba. * * * IV. That the said Sir William Scroggs, since he was made chief justice of the king's bench, hath, together with the other judges of the said court, most notoriously departed from all rules of justice and equality in the imposition of fines upon persons convicted of misdemeanors in said court." The result was that the chief justice was removed from office and given a pension for life. (State Trials, Vol. VIII, pp. 195, 216.)

XI. PROCEEDING AGAINST LORD CHIEF JUSTICE KEELING.

Intervening between the case of Berkley and other judges (1640) and that of Sir William Scroggs (1680) are proceedings by the Commons against Lord Chief Justice Keeling, which occurred in 1667, notable for the reason that they clearly illustrate what kind of judicial acts were considered as impeachable high crimes and misdemeanors at that time. "A copy of Judge Keeling's case, taken out of the Parliament Journal, December 11, 1667: 'The House resumed the hearing of the rest of the report touching the matter of restraint upon juries; and that upon the examination of divers witnesses, in several causes of restraints put upon juries, by the Lord Chief Justice Keeling; whereupon the committee made their resolutions, which are as follows: 1. That the proceedings of the Lord Chief Justice, in the cases now reported, are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequence to the lives and liberties of thhe people of England, and tends to the introducing of an arbitrary government. 2. That in the place of judicature, the Lord Chief Justice hath undervalued, vilified, and condemned Magna Charta, the great preserver of our lives, freedom, and property. 3. That he be brought to trial, in order to condign punishment in such manner as the House shall judge most fit and requisite.'" (State Trials, vol. 6, p. 991, seq.)

"On the 16th of October, 1667, the House being informed 'that there have been some innovations of late in trials of men for their lives and deaths, and in some particular cases restraints have been put upon juries in the inquiries,' this matter is referred to a committee. On the 18th of November this committee are empowered to receive information against the Lord Chief Justice Keeling for any other misdemeanors besides those concerning juries. And on the 11th of December, 1967, the committee report several resolutions against the Lord Chief Justice Keeling of illegal and arbitrary proceedings in his office. The chief justice desiring to be heard, he is admitted on the 13th of December and heard in his defense to the matters charged against him, and being withdrawn, the House resolve 'that they will proceed no further in the matter against him.'" (4 Hatsel Prec., pp. 123–4, cited in Chase's Trial, Vol. II, p. 461.)

XII. REMOVAL BY ADDRESS PROVIDED BY THE ACT OF SETTLEMENT

By the foregoing analysis of the only English precedents to which we can look for expositions of the meaning of the phrase "high crimes and misdemeanors," as applied to the conduct of English judges, the fact is put beyond all question that the only judicial acts which the House of Commons ever regarded as falling within that category are such acts as a judge performs while sitting upon the bench, administering the laws of the realm, either between private persons or between the Crown and the subject. In the case of Mr. Justice Berkley the gravamen of the charge was that he rendered a judgment in the matter of ship money in conflict with what his triers considered the law of the realm to be. In the case of Chief Justice Scroggs the gravamen of the charge was that he arbitrarily discharged grand juries; that in a libel case he rendered an illegal judgment, and that he imposed unjust fines upon those convicted of misdemeanors. In the proceedings against Chief Justice Keeling the gravamen of the charge was that he had put "restraint" upon juries by fining them for their verdicts. "Wagstaff and others of a jury were fined an hundred marks a piece by Lord Chief Justice Keeling." (4 Hatsell Prec., p. 124, note.) Excepting bribery there is no case in the parliamentary law of England which gives color to the idea that the personal misconduct of a judge, in matters outside of his administration of the law in a court of justice, was ever considered or charged to constitute a high crime and misdemeanor. When the question is asked, By what means is the personal misconduct of an English judge, not amounting to a high crime and misdemeanor, punished? the answer is easy.

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

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

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

On May 10, 1776, the Continental Congress recommended to the several conventions and assemblies of the colonies the establishment of independent governments "for the maintenance of internal peace and the defense of their lives, liberties, and properties." (Charters and Constitutions, vol. 1, p. 3.) Before the end of the year in which that recommendation was made the greater part of the colonies had adopted written constitutions, in which were restated, in a dogmatic form, all of the vital principles of the English constitutional system. Illustrations of the adoption of the English plan for the removal of judges by impeachment and address may be drawn from the following State constitutions: The constitution of Pennsylvania of 1776, Article V, section 2, provides that "the judges of the supreme court and of the several courts of common pleas shall hold their offices during good behavior. But for any reasonable cause, which shall not be sufficient ground for impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature."

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

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and sworn shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this constitution: Provided, nevertheless, the governor, with consent of the council, may remove them upon the address of both houses of the legislature."

The constitution of Georgia of 1798, Article III, section 1, provides that "the judges of the superior court shall be elected for the term of three years, removable by the governor on the address of two-thirds of both houses for that purpose, or by impeachment and conviction thereon." The constitution of New Hampshire of 1784, Article I, part 2, provides that "all judicial officers, duly appointed, commissioned, and sworn, shall hold their offices during good behavior, excepting those concerning whom there is a different provision made in this constitution: Provided, nevertheless, the president, with the consent of council, may remove them upon the address of both houses of the legislature." The constitution of Connecticut of 1818, Article V, section 3, provides that "the judges of the supreme court and of the superior court shall hold their offices during good behavior; but may be removed by impeachment, and the governor shall also remove them on the address of two-thirds of the members of each house of the general assembly." It is said that the Constitution of New York of 1777 was the model from which the impeachment clauses of the Constitution of the United States were copied. (6 Am. Law Reg., N. S., 277.)

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

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

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

On February 22, 1905,[48] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

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

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

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

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

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

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

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

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

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

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

The same comments are applicable to the charges made in articles 4 and 5 as to the use by the respondent of a certain car belonging to a certain railroad, "the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors." Even if it could be established that the circumstances attending such a transaction would warrant removal by address, no advance would be made toward the conclusion that such acts constitute an impeachable high crime and misdemeanor as defined in English parliamentary law, because the further allegation that

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"the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as part of the necessary expenses of operating said road" falls far short of the English and American rule as to the evil or wicked intent which must accompany a judgment or opinion delivered on the bench in order to render it impeachable. Nothing is better settled than the fact that a judge is not impeachable even for a judgment, order, or opinion rendered contrary to law unless it is alleged and proved that it was rendered with an evil, wicked, or malicious intent. Justice Berkley was impeached not simply because he decided in favor of ship money, but because he "traitorously and wickedly endeavored to subvert the fundamental laws" of the realm thereby. Chief Justice Scroggs was impeached not simply for imposing "fines upon persons convicted of misdemeanors in said court," but because he imposed them "for the further accomplishing of his said traitorous and wicked purposes."

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

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

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

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to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.'" (American Law Review, vol. 16, p. 804.)

The fathers knew exactly the limitations of the phrase adopted, and they repelled the idea that it was ever to be enlarged or diminished. If nonresidence of a judge in his district could be added by Congress to the list of impeachable offenses, that list could be thus indefinitely extended; or, by the same authority, every impeachable offense as understood in 1787 could be abolished. If it is admitted that Congress can change the organic definition, either by addition or subtraction, it follows as clearly as a mathematical demonstration that the scheme of impeachment provided in the Constitution can be entirely remodeled by legislation. The validity of the section in question, making nonresidence a high misdemeanor, can not be supported by serious argument. Even if it could be, the fact can not be lost sight of that its plain provision is that "every such judge shall reside in the district for which he is appointed." It will not be disputed that Judge Swayne was so residing in the district for which he was appointed at the time that subsequent legislation excluded the place of his residence from such district. Certainly nothing more can be put forward by those who assert the validity of section 551 than the contention that it was respondent's duty to remove, within a reasonable time, from the district for which he was appointed into the new one for which he was not appointed. It follows, therefore, that the accusation now made amounts to nothing more than the charge that respondent did not act with sufficient alacrity; that he did not remove his residence into the new district with sufficient promptness. How could such laches possibly constitute an impeachable high crime and misdemeanor?

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

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

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

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

On February 23, 1905,[49] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Manager Henry W. Palmer, of Pennsylvania, filed, by permission the following brief:

A BRIEF OF AUTHORITIES ON THE LAWS OF IMPEACHMENT

The purpose of this brief is to show—

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

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

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

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

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

"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors. (Art. II, sec. 4.)

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

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

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

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

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

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

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

Said Mr. Bayard, in Blount's trial:

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

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

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

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

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

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

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

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

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[Story on the Constitution, p. 583.]

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

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

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

[Page 587.]

"The other point is one of more difficulty. In the argument upon Blount's impeachment it was pressed with great earnestness, while there is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common sense that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the Government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public confidence? Would not these reasons for his removal be just as strong as if it were a case of an official bribe? The argument on the other side was that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied that it must be limited to malconduct in office."

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

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

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

[Rawle on the Constitution, p. 210.]

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

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

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

[Cushing's Law and Practice of Legislative Assemblies, p. 980, par. 2539.]

"The purpose of impeachment, in modern times, is the prosecution and punishment of high crimes and misdemeanors, chiefly of an official or political character, which are either beyond the reach of the law, or which no other authority in the

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State but the supreme legislative power is competent to prosecute, and, by the law of Parliament, all persons, whether peers or commoners, may be impeached for any crimes or offenses whatever."

[Trial of Judge Peck, p. 427. Mr. Buchanan's argument.]

"What is an impeachable offense? This is a preliminary question which demands attention. It must be decided before the court can rightly understand what it is they have to try. The Constitution of the United States declares the tenure of the judicial office to be 'during good behavior.' Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small distance. Another question meets us. What is misbehavior in office? In answer to this question and without pretending to furnish a definition, I freely admit we are bound to prove that the respondent has violated the Constitution or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse as well as in the usurpation of authority.

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

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

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

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

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

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[Judge Spencer's argument, p. 290.]

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

[Mr. Wickliffe's argument, p. 308.]

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

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

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

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

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

"The offense charged, Judge Story remarks, was not defined by any statute of the United States. It was an attempt to seduce a United States Indian interpreter from his duty, and to alienate the affections and conduct of the Indians from the public officers' residing among them."

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

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

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

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

The term "misdemeanor" covers every act of misbehavior in a popular sense. Misdemeanor in office and misbehavior in office mean the same things. (7 Dane Abgt., 3 5.) Misbehavior, therefore, which is a mere negative of good behavior, is an express limitation of the office of a judge.

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

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

If that position is well taken, a judge might be a common drunkard, an open frequenter of disreputable resorts; he might be a common theif, an embezzler of trust funds, a gambler, even a murderer. If he could manage to keep out of

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jail and attend to his judicial duties, the remedy by impeachment would not reach him. To state the proposition, is to argue it.

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

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

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

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

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

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

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

For example, suppose no English law condemned the making of false certificates by a judge for the purpose of obtaining money from the Treasury. Can it be said that if an English judge had been guilty of such an offense that he would not have been subject to imeachment? If so, then neither can it be said that Congress created new impeachable offenses when the act was passed pertaining to false certificates.

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

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

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

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

2016. Argument of Mr. Manager Clayton that a judge may be impeached for misbehavior not necessarily connected with his judicial functions.—On February 24, 1905,[50] in the Senate sitting for the impeachment trial of Judge Charles Swayne. Mr. Manager Henry D. Clayton, of Alabama, said in final argument:

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

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

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

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

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

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

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

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

Again, on page 586, this statement:

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

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

Again, on page 591, this statement:

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

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

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

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

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

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

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

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

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

In Judge Pickering's case it will be remembered that he was accused of drunkeness. He was also accused of releasing a ship which had been libeled

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without requiring bond. It might be argued that he did not get drunk in his official capacity; and yet the Senate in that case did impeach him and remove him from office, and that was one of the charges.

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

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

The extract referred to is as follows:

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

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

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

"The Constitution provides that—

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

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

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

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

"Humphreys, a district judge of the United States, was convicted on impeachment, not only for treason, but also for refusing to hold court, for holding office under the Confederate States, and for imprisoning citizens for expressing their sympathy with the Union. The managers of the House of Representatives who opened the case admitted that none of these offenses except the treason was indictable.

"Some advocates have gone so far as to maintain by a misapplication of a term of the common law that the proceedings on an impeachment are not a trial, but a so-called 'inquest of office,' and that the House and Senate may thus remove an officer for any reason that they approve. That Congress has the power to do so may be admitted. For it is not likely that any court would hold void collaterally a judgment on an impeachment where the Senate had jurisdiction over the person of the condemned. And undoubtedly a court of impeachment has the jurisdiction to determine what constitutes an impeachable offense. But the judgments of the Senate of the United States in the cases of Chase and Peck, as well as those of the State senates in the different cases

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which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime. And public opinion must be irremediably debauched by party spirit before it will sanction any other course.

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

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

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

2017. Review of impeachments in Congress to show that judges have been impeached only for acts of judgment performed on the bench, as contradistinguished from personal acts performed while in office.—On February 22, 1905,[51] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

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

Turning first to the case against John Pickering, judge of the district court of New Hampshire, for practical illustrations, we find that judge charged with misconduct while adjudicating a certain admiralty case pending in said district court: "Yet the said John Pickering, being then judge of the said district court, and then in court sitting, with intent to defeat the just claims of the United States, did refuse to hear the testimony of the said witnesses so as aforesaid produced in behalf of the United States, and without hearing the said testimony so adduced in behalf of the United States in the trial of said cause did order and decree the ship *Eliza*, with her furniture, tackle, and apparel, to be re-

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

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stored to the said Eliphalett Ladd, the claimant, contrary to his trust and duty as judge of the said district court, in violation of the laws of the United States and to the manifest injury of their revenue." (Art. II.) Again (Art. III), when an appeal was prayed in open court in behalf of the United States, the charge is that "the said John Pickering, judge of the said district court, disregarding the authority of the laws, and wickedly meaning and intending to injure the revenues of the United States, and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal as prayed for."

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

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

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

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

The words of the accusation are that the said Humphreys "did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last

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

2018. Review of the deliberation of the Constitutional Convention as bearing on the use of the words "high crimes and misdemeanors."—On February 22, 1905,[52] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support of their plea of jurisdiction as to the first seven articles. This brief which was signed by them as counsel but which as they said had been prepared by another, covered many questions relating to impeachments, the following being among them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As a well-known authority has expressed it: "The first proposition was to use the words, 'to be removable on impeachment and conviction of malpractice and neglect of duty.' It was agreed that these expressions were too general. They were therefore stricken out. It was voted that the clause should be simply 'removable on impeachment.' The debate shows that the Members did not wish the Senate to be able to remove a civil officer whenever he acted in a way detrimental to the public service, for such a power was expressly refused. (Citing Madison Papers, p. 481, heretofore quoted.) A general debate took place on a clause in one draft which made the President triable only for treason and bribery. It was urged that the jurisdiction was too limited. The following are extracts from the debate which ensued: Colonel Mason said: 'Treason, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason. Attempts to subvert the Constitution may not be treason as above defined.' He moved to insert after 'bribery' the words 'or maladministration.' Madison: 'So vague a term will be equivalent to a tenure during the pleasure of the Senate.' Mason withdrew 'maladministration' and substituted 'other high crimes and misdemeanors against the State.' In the final draft the words 'against the State' were omitted, doubtless as surplusage, and the expressions finally adopted, 'crimes' and 'misdemeanors,' were words which had a well-defined signification in the courts of England and in her colonies as meaning criminal offenses at common (parliamentary) law." (American Law Review, vol. 16, p. 804, article on "Impeachable offenses under the Constitution of the United States.") The term "common" instead of "parliamentary" law is carelessly used in that excellent statement, as it often is elsewhere. After quoting Rawle on Constitution (200, Lawrence (Johnson's Imp., Vol. I, p. 125)) remarks: "This author says in reference to impeachments, 'we must have recourse to the common law of England for the definition of them;' that is, to the common parliamentary law. (3 Wheaton, 610; 1 Wood and Minot, 448.)"

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

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

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On February 22, 1905,[53] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Messrs. Anthony Higgins and John M. Thurston, of counsel for the respondent, offered a brief in support to their plea of jurisdiction as to the first seven of the articles. This brief, which was signed by them as counsel, but which, as they said, had been prepared by another, covered many questions relating to impeachments, the following being among them:

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

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

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

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

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as "maladministration" was rejected and the limited phrase in question substituted. The declaration was clearly made at the time that there must be no undue weakening of the independence of the Federal judiciary. The necessity for such a precaution was soon justified by events.

A leading authority upon the subject tells us that upon the destruction of the Federalist party on the election of Jefferson "An assault upon the judiciary, State and Federal, was made all along the lines. In some States, as New Hampshire, old courts were abolished and new ones, with similar jurisdiction, created for the sole purpose of obtaining new judges. In Pennsylvania an obnoxious Federal judge was removed from the common pleas by impeachment; and an impeachment of all the Federal judges of the highest court was made, but failed through the uprising of the entire bar, irrespective of party lines, in defense of their official chiefs. A similar attack was made upon the Federal judiciary." (Foster on the Constitution, Vol. I, p. 531.) With the possibility of such an assault impending it is not strange that the makers of our Federal Constitution should have confined the power of removing judges by impeachment within the well-known limits which the English constitution had defined.

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

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

On February 23, 1905,[54] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, in final argument, said:

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

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

Suppose a judge to commit murder upon the dry land within the confines of a State. That would not be a high crime or misdemeanor within the provision of any act of Congress. Could it successfully be maintained that it was not a high crime and misdemeanor within the meaning of Article II, section 4, of the Constitution, or that it was not such a breach of good behavior as would justify removal from office? If that be the proper construction, then it is possible to imagine that as the respondent transacted official business at and dated his communications from "United States district court, northern district of Florida, judge's chambers, Guyencourt, Del.," so a more violent and vicious man might conduct business at "Judge's chambers, State penitentiary," and still be free from all danger of impeachment or removal from the judicial office.

I have shown, Mr. President, that men have formerly argued that only indictable offenses are subjects for impeachment; that as there were no common-law offenses against the United States there can be no impeachment except for crimes declared and defined by act of Congress. But now, in the 48-page brief served upon us last evening, bearing the names of the honorable counsel for respondent, but the authorship of which they distinctly disavowed—and I now know the reason why—we find the astounding doctrine that no can can be impeached for any offense declared by Congress. Therefore no officer can be impeached, no

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

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matter what he does, unless we can find that in England some judge had been impeached for the same specific offense prior to the adoption of our Constitution, which borrowed something from the other country in this matter.

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

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

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

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

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

The Senate has always been governed in impeachment cases by the lex et consuetudo parliamenti. It requires but a brief investigation to show that according to the English parliamentary practice in vogue at and prior to the adoption of the Constitution, the greatest possible variety of offenses, not indictable, were nevertheless held proper causes for impeachment.

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

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

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

And again (p. 601):

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

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

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

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

"The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. * * * Such a cause may be found in the fact that either in the discharge of his office or aside from

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its functions he has violated a law or committed what is technically denominated a crime, but a cause for removal from office may exist where no offense against positive law is committed, as where the individual has from immorality, imbecility, or maladministration become unfit to exercise the office."

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

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

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

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

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

No English judge has been impeached for murder, or perjury, or forgery, or larceny; and yet they were undoubtedly impeachable offenses in English as they are here to-day. They, or any of them, would certainly constitute a breach of that "good behavior" during which Federal judges hold their commissions. Surely an offense which would have been impeachable without a statute is none the less so because Congress has declared it a misdemeanor. Taking money out of the Treasury on a false certificate would have been impeachable in England before our Constitution. It is none the less so here, statute or no statute.

JURISDICTION OF FIRST SEVEN ARTICLES

Respondent denies that the offenses charged in the first seven articles are proper subjects of impeachment on the ground, as we understand it, that they were committed by him in his private and not in his official capacity; or, in other words, that the articles do not charge misbehaviors or misdemeanors in office. We labor under the impression that the respondent is "in office," and that any misdemeanor committed by him, either in his private or official capacity, since he accepted the Presidents commission was a misdemeanor "in office." He may have been out of his court room and out of his district, but he has never been out of office.

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

The Century Dictionary gives this definition:

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

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

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

Such is manifestly the intention of the Constitution. That instrument says "during good behavior." It does not, as some of the State constitutions do, add the words "in office." It says "high crimes and misdemanors," but it does not add "in office." In the brief of respondent's honorable counsel the authorship of which they disavow, they tell us, and it is entirely true, that at one stage of

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its formation the provision read "misdemeanors against the State." But as the words "against the State" were stricken out they argue that it must be construed as if they had been left in.

JUDGE HUMPHREY'S CASE

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

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

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

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

Upon that article the vote against him was 35 to 19. A change of one vote would have expelled him from the Presidency.

Treason, removal for which is made compulsory, is specifically defined by the Constitution in these words:

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

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

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

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

BLOUNT'S CASE

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

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

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

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

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

Argument that a judge may be impeached for misbehavior generally.

On February 25, 1905,[55] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, in final argument, said:

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

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

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

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

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

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

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Those who framed the Constitution meant to deny and did deny to the Congress all power whatsoever to declare anything a high crime or misdemeanor which was not such when the Constitution was made."

Then if you or your successors should modestly say to these gentlemen, "Pray tell us, then, what are the things for which an impeachment will lie? What is comprehended within the term 'high crimes and misdemeanors?' What, within the meaning of the Constitution, made by those short-sighted men, so long, long ago in their graves, is embodied in these words?" They would answer then, I suppose, as this wise commentator of to-day answers, "I do not know; nobody ever has said, and nobody will ever be able to say."

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

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

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

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

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

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

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

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offender and protect the public from the vile contamination of his continued presence in office. We do not take that view of the matter.

2022. Opinion of Attorney-General Felix Grundy that Territorial judges are not civil officers of the United States within the meaning of the impeachment clause of the Constitution.—On February 4, 1839,[56] as pertinent to the consideration of a pending bill to amend the law establishing the Territorial government of Wisconsin, Mr. Isaac H. Bronson, of New York, chairman of the Committee on Territories, presented to the House a letter of the Attorney-General of the United States, Hon. Felix Grundy, giving an opinion on the subject of the removal of Territorial judges by impeachment:

The provision of the Constitution which relates most directly to this subject is contained in the first section of the third article, which declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

The construction of this part of the Constitution has been settled, it seems to me, by the opinion of Congress, expressed by various acts, and also by the Supreme Court of the United States.

By the article of the Constitution referred to the judges are to hold their offices during good behavior. Congress can not consistently with this provision provide any other or different tenure of office within the States.

Congress has in most cases limited the tenure of office of Territorial judges to four years. This could not be done were they judges under or provided for by the Constitution, because by that instrument the tenure is during good behavior. It should be noticed that Congress has imposed this limitation of four years, not in a single instance only, but in many. It has been imposed in the Territories embraced within the limits of the original States, where the Territory has been ceded to the General Government, and Territorial governments have been created therein. It has also been done in the Territories purchased by the United States from foreign nations. I think these acts clearly prove the sense of Congress to be that Territorial judges are not judges under the Constitution, but are mere creatures of legislation.

I have said that the Supreme Court of the United States have also decided upon this point. In the case of the American Insurance Company and others *v.* Canter, reported in first Peters, the court very distinctly recognized the opinion above expressed, and convey their views in the following strong language: "These courts (meaning Territorial courts), then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited; they are incapable of receiving it; they are legislative courts, created in virtue of the general rights of sovereignty."

The only remaining inquiry is as to the liability of Territorial judges to impeachment under the Constitution. The fourth section of the second article of the Constitution is in these words: "The President, Vice-President, and all civil

[56] Third session Twenty-fifth Congress, Journal, p. 452, House Ex. Doc. No. 154.

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officers of the United States shall be removed from office on impeachment and conviction of treason, bribery, or other high crimes and misdemeanors."

If the construction of the Constitution be correct, as I suppose it is, that these judges are not constitutional but legislative judges, I can see nothing in the Constitution which would warrant their being embraced by the expression, "and all civil officers of the United States." They are not civil officers of the United States in the constitutional meaning of the phrase. They are merely Territorial officers, and therefore, in my opinion, not subject to impeachment and trial before the Senate of the United States.

2023. Reference to a summary of provisions of State constitutions relating to impeachment and removal by address.—On February 22, 1905,[57] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, Messrs. John M. Thurston and Anthony Higgins, of counsel for respondent, filed as part of an argument on a plea as to jurisdiction a summary of provisions in the constitutions of the various States at various periods of their existence. It appears in full in the Congressional Record of that date.

2024. The question of reimbursement of respondent for his expenses in an impeachment trial.—On February 28, 1905,[58] in the Senate, the President pro tempore laid before the Senate the following communication from the counsel of Judge Charles Swayne; which was referred to the Committee on the Judiciary:

To the President pro tempore of the United States Senate:

The undersigned have the honor to request that, inasmuch as Judge Charles Swayne has been declared not guilty by the Senate of the impeachment charges preferred against him by the House of Representatives, an allowance may be made as a part of the expenses of the Senate in connection with the impeachment which shall enable him to defray the expenses of his counsel and the other expenses incurred by him in making his defense.

The undersigned will submit a statement of such expenses whenever requested to do so by the Senate.

ANTHONY HIGGINS.
JOHN M. THURSTON.

WASHINGTON, *February 27, 1905.*

The joint resolution,[59] appropriating for the expenses of the Senate in the trial made no provision for granting this request.

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[57] Third session Fifty-eighth Congress, Record, pp. 3035–3041.
[58] Third session Fifty-eighth Congress, Record, p. 3601.
[59] 33 Stat. L., p. 1280.

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Functions of the House in Impeachment*

1. Provision of the Constitution. Section 2025.[1]
2. English precedents as to function of the Commons. Sections 2026–2027.[2]
3. Attendance at trial. Section 2028.[3]
4. Continuation of proceedings from Congress to Congress. Section 2029.
5. Charges preferred by petition. Section 2030.
6. The managers. Sections 2031–2037.[4]
7. Early forms of subpenas, etc. Sections 2038–2040.
8. Form of signing testimony by witnesses. Section 2041.
9. Consideration of matters relating to trial. Sections 2042–2044.
10. High privilege of questions relating to impeachment. Sections 2045–2054.

2025. The sole power of impeachment is conferred on the House of Representatives by the Constitution.—The Constitution, in Article I, section 2, provides:

> The House of Representatives * * * shall have the sole power of impeachment.

2026. Under the parliamentary law of impeachment the Commons, as grand inquest of the nation and as accusers, become suitors for penal justice at the bar of the Lords.

The Commons, in impeaching, usually pass a resolution containing a criminal charge against the accused and direct a Member to impeach him by oral accusation before the Lords.

The person impeaching on behalf of the Commons signifies that articles will be exhibited.

In impeaching, the spokesman of the Commons asks that the delinquent be sequestered from his seat, or committed, or that the Peers take order for his appearance.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachment:

*Hinds' Precedents, vol. 3, p. 361 (1907).

[1] Nature of inquiry preliminary to impeachment. Section 2366 of this volume.

[2] Parliamentary law forbids Lords to join in. Section 2056.

[3] House did not attend in Blount's case (sec. 2318) and in the Peck trial only in the preliminary proceedings (sec. 2373). Attended in Committee of Whole in Chase trial (sec. 2350, 2354) and also in Johnson trial (sec. 2420, 2427, 2435). Also see section 2392 for Humphrey's trial, sections 2449, 2467 for Belknap's, and section 2483 for Swayne's.

[4] See also other sections relating to the managers: Choice on appointment of. Sections 2300, 2306, 2323, 2345, 2350, 2368, 2388, 2417, 2448, 2475. Held not to be a committee. Section 2420. Sometimes endowed with power to compel testimony and even make investigations. Sections 1685, 2419, 2423. Conduct and privileges of, during a trial. Sections 2144–2154. Announced on entering Senate Chamber to attend trial. Section 2427. Required to rise and address the Chair before speaking. Section 2146. As to making of motions by. Sections 2136, 2144, 2147, 2189. Rule as to questions and colloquies. Section 2154. May object to witnesses answering questions asked by Senators. Sections 2182–2186. May argue on questions put on propositions offered by Senators. Sections 2148, 2188. May not move to amend a proposition offered by a Senator. Section 2147. The claim that they should have the closing of all arguments. Section 2136. They protest against delays during the trial of the President. Section 2150. Are admonished not to delay. Section 2151. Decline in the Pickering case to discuss a matter from a third party. Section 2334. As to reports in relation to trial. Sections 2338, 2423, 2468.

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Accusation. The Commons, as the grand inquest of the nation, become suitors for penal justice. (2 Wood., 597; 6 Grey, 356.) The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach him by oral accusation at the bar of the House of Lords, in the name of the Commons. The person signifies that the articles will be exhibited, and desires that the delinquent may be sequestered from his seat, or be committed, or that the Peers will take order for his appearance. (Sachev. Trial, 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616; 6 Grey, 324.)

2027. The Commons attend generally in impeachment trials, but not when the Lords consider the answer on proofs or determine judgment.

The Commons attend impeachment trials in committee of the whole, or otherwise, at discretion, and appoint managers to conduct proof.

The presence of the Commons is considered necessary at the answer and the judgment in impeachment cases.

Method of taking the vote in judgment in English impeachment trials.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Presence of Commons. The Commons are to be present at the examination of witnesses. (Seld. Jud., 124.) Indeed, they are to attend throughout, either as a committee of the whole House, or otherwise, at discretion, appoint managers to conduct the proofs. (Rushw. Tr. of Straff., 37; Com. Journ., 4 Feb., 1709–10; 2 Wood., 614.) And judgment is not to be given till they demand it. (Seld. Jud., 124.) But they are not to be present on impeachment when the Lords consider of the answer or proofs and determine of their judgment. Their presence, however, is necessary at the answer and judgment in cases capital (id., 58, 158) as well as not capital. (Id., 162.) The Lords debate the judgment among themselves. Then the vote is first taken on the question of guilty or not guilty; and if they convict, the question or particular sentence is out of that which seemeth to be most generally agreed on. (Seld. Jud., 167; 2 Wood., 612.)

2028. In 1830, during the impeachment trial of Judge Peck, the House reconsidered its decision to attend the trial daily.

Instance of the reconsideration of an order which had been partly executed.

On December 23, 1830,[5] this resolution was agreed to by the House:

Resolved, That, during the trial of the impeachment now pending before the Senate, this House will meet daily at the hour of 11 o'clock in the forenoon, and that from day to day it will resolve itself into a Committee of the Whole and attend said trial during the continuance thereof and until the conclusion of the same.

On the same day the House attended the trial in accordance with the order, and continued to do so as long as it remained in effect.

On December 24 [6] Mr. Kensey Johns, jr., of Delaware, moved to reconsider the vote whereby the resolution was agreed to, and the consideration of this motion was postponed to December 27.

On December 27,[7] after consideration, the motion to reconsider was laid on the table.

[5] Second session Twenty-first Congress, Journal, pp. 97, 99.
[6] Journal, p. 101.
[7] Journal, p. 105.

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On January 3, 1831,[8] Mr. Johns moved that the House proceed to the consideration of the motion to reconsider,[9] and Mr. Johns's motion was agreed to, yeas 117, nays 58.

A motion to lay the motion to reconsider on the table was disagreed to, yeas 55, nays 111.

And the question being put, "Will the House reconsider the same vote?" it was decided in the affirmative.

The question recurring on agreeing to the original resolution of December 23, after debate, on January 4 [10] the question was put "that the House do, on reconsideration, agree to pass the same," and it was decided in the negative, yeas 69, nays 118.

The House up to this time had daily attended the impeachment trial. Thereafter it ceased to do so until a new order was adopted.

2029. The House sometimes continues an investigation begun in a preceding Congress with view to an impeachment, making use of the former report and the testimony already taken.

The House may empower a subcommittee to send for persons and papers and conduct an investigation.

On January 30, 1892,[11] Mr. William C. Oate, of Alabama, from the Committee on the Judiciary, reported the following preamble and resolution, which were agreed to:

Whereas, Aleck Boarman, judge of the United States district court for the western district of the State of Louisiana, was charged in the House of Representatives of the Fifty-first Congress with high crimes and misdemeanors alleged to have been committed by him as a judge; and

Whereas, the Committee on the Judiciary, under the authority of said House, investigated the alleged official misconduct in office of the said judge and took a considerable volume of testimony thereon both against said judge and for him, he being present in person or by his counsel whenever and wherever the said testimony was taken; and

Whereas, upon due consideration thereof the said committee reported a resolution to the said House of Representatives declaring that Judge Boarman should be impeached of high crimes and misdemeanors in office, and accompanying the said resolution was the evidence upon which the same was based, which was duly printed under the direction of said committee and by order of the House; and

Whereas, the said resolution never came to a vote, and hence never was adopted by said House for the lack of time to duly consider the same; Therefore,

Be it resolved, That the said report, charges, and evidence be referred to the Commitee on the Judiciary, with instructions to thoroughly investigate the same and to report to the House the findings and recommendations in regard thereto at any time.

And for the purpose of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid during the Fifty-first Congress in the case of Judge Boarman, and may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against the said judge; and in respect to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary; to send a subcommittee whenever and wherever deemed necessary to take testimony for the use of said committee, and the said subcommittee while so employed shall have the same powers in respect

[8] Journal, pp. 131–133.

[9] Under the present practice of the House a motion to lay on the table a motion to reconsider disposes of it finally. But in 1831 that practice was not established. About 1842 it was recognized that the tabling of a motion to reconsider was a final disposition of it.

[10] Journal, pp. 139, 140.

[11] First session Fifty-second Congress, Journal, p. 49; Record, p. 689.

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to obtaining testimony as are herein given to said Committee on the Judiciary: that the Sergeant-at-Arms by himself or deputy shall serve the process of said committee and subcommittee and execute its orders and shall attend the sittings of the same as ordered and directed thereby, and the expenses of said investigation shall be paid out of the contingent fund of the House.

On June 1 [12] the committee reported in favor of the impeachment of Judge Boarman.

2030. Instance wherein the Speaker presented a petition in which were preferred charges against a Federal judge.

A petitioner who preferred charges against a Federal judge, funished the certificate of a notary to his signature. (Footnote.)

On June 25, 1906,[13] the Speaker under the rule presented a petition, as follows, which was referred to the Committee on the Judiciary:

Petition of Francis C. Mahon, of New Orleans, La., preferring charges against Charles Parlance, district judge of the eastern district of the United States court of Louisiana.[14]

2031. When managers of an impeachment are elected by ballot, a majority is required for the choice of each.—On December 5, 1804,[15] the House having decided that seven managers should be appointed by ballot to conduct the impeachment of Judge Samuel Chase, the ballot was taken, and the following Members appeared to be duly elected by a majority of the votes of the whole House, as six of the said managers, to wit: Mr. John Randolph, Mr. Rodney, Mr. Nicholson, Mr. Early, Mr. Boyle, and Mr. Nelson.

The House proceeded to a second ballot for another manager, when the ballots being examined it appeared that no Member had a majority of the votes of the whole House, but that the highest number of votes was given in favor of Mr. George Washington Campbell.

The Speaker [16] decided that it being provided by a standing rule and order of the House that in case of any second ballot of the House in which the number required to compose a committee should not be elected by a majority of the votes given on the second ballot, a plurality of votes shall prevail, and therefore that in his opinion the said George Washington Campbell was duly elected the seventh manager.

On an appeal this decision was reversed, and a further ballot being taken Mr. Campbell received a majority of votes and was elected.

The Annals show that the Speaker based his decision on the supposition that the rules of the House for choice of committees by ballot was applicable to the choice of managers.

But debate arising the concensus of opinion was that on former occasions a majority of votes had been given for each manager, although in the case of Judge Pickering this appeared rather from the recollection of gentlemen than from the Journals. The Speaker invited the appeal, which was taken by Mr. John Randolph, of Virginia, with expressions of respect.

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[12] Journal, p. 207; Record, p. 4908.

[13] First session Fifty-ninth Congress, Record, p. 9244.

[14] This petition was signed by the petitioner, and as the signature was not certified in any way it was returned with the statement that it should be certified. It was then returned with the certificate and seal of a notary, and thereupon was presented by the Speaker.

[15] Second session Eighth Congress, Journal, pp. 101, 102 (old edition), 44 (Gales and Seaton) Annals, pp. 762, 763.

[16] Nathaniel Macon, of North Carolina, Speaker.

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2032. A Member appointed one of the managers of an impeachment may be excused by the House.—On January 25, 1805,[17] the House excused Mr. Roger Nelson, of Maryland, from serving as one of the managers appointed to conduct the impeachment against Judge Samuel Chase.

2033. The House gives leave to its managers to examine Members as witnesses in an impeachment trial, and leave to its Members to attend for that purpose.—On April 28, 1876,[18] Mr. Scott Lord, of New York, offered this resolution, which was agreed to:

Resolved, That the managers have leave to examine any member of the Committee on Expenditures in the War Department and any Member of the House whom they deem necessary as a witness on the trial of the articles of impeachment against William W. Belknap, and that leave is hereby given to Members to attend the trial for that purpose if they see fit to do so.

2034. A resolution empowering managers of an impeachment to take the testimony of Members was presented as a question of privilege.—On April 28, 1876,[19] Mr. Scott Lord, of New York, presented as a question of privilege, and as required by the rule of parliamentary law, the following resolution, which was agreed to without debate:

Resolved, That the managers have leave to examine any member of the Committee on Expenditures in the War Department and any Member of the House whom they deem necessary as a witness on the trial of the articles of impeachment against William W. Belknap, and that leave is hereby given to Members to attend the trial for that purpose if they see fit to do so.

2035. The inability of a manager to attend a session of an impeachment trial is announced by his associates.

No question was made on an occasion during the Swayne trial when less than a quorum of the managers were in attendance.

On February 17, 1905,[20] in the Senate sitting for the impeachment trial of Judge Swayne, the managers attended, with the exception of Mr. Manager David H. Smith, of Kentucky.

Before proceedings began, Mr. Manager Henry D. Clayton, of Alabama, announced:

Mr. President, Mr. Manager Smith, of Kentucky, has requested me to say to the court that he is unable to attend to-day's session on account of sickness.

2036. On February 20, 1905,[21] the Senate, sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Mr. President, I desire to announce the unavoidable absence to-day of Managers Palmer, Powers, of Massachusetts; Perkins and Smith, of Kentucky. We shall proceed as best we may in their absence.

No question was made as to the fact that only three of the seven managers—less than a quorum—were in attendance.

2037. The House thanked its managers for their services in the Swayne impeachment trial.— On March 3, 1905,[22] Mr. Swager

[17] Second session Eighth Congress, Journal, p. 105 (Gales and Seaton, ed.).
[18] First session Forty-fourth Congress, Journal, p. 880.
[19] First session Forty-fourth Congress, Record, p. 2818.
[20] Third session Fifty-eighth Congress, Record, p. 2776.
[21] Third session Fifty-eighth Congress, Record, p. 2899.
[22] Third session Fifty-eighth Congress, Record, p. 3988.

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Sherley, of Kentucky, by unanimous consent, offered this resolution, which was agreed to by the House:

Resolved, That the thanks of the House be, and are hereby, extended to the managers on behalf of the House in the impeachment proceedings of Judge Charles Swayne before the Senate of the United States, to wit, Henry W. Palmer, Samuel L. Powers, Marlin E. Olmsted, James B. Perkins, David A. De Armond, Henry D. Clayton, and David H. Smith, for the able and efficient manner in which they discharged the onerous and responsible duties imposed upon them.

2038. Forms of subpoena and compulsory process issued by House committee to produce persons and papers for Blount impeachment.—In the proceedings for the impeachment of William Blount in 1797–8, the managers of the House of Representatives issued a subpoena in the following form: [23]

To John Rogers, resident in the Cherokee Nation:

Whereas the House of Representatives of the United States did, on the 8th day of July, in the year of our Lord one thousand seven hundred and ninety-seven, resolve as follows, to wit:

"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House, of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee, pursuant to the said resolution."

And whereas the House of Representatives of the United States did, on the 10th day of July, in the year aforesaid, further resolve and order, as follows, to wit:

"*Resolved*, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House, of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

"*Ordered*, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be of the said committee in his stead."

You are hereby required, in pursuance of the powers vested in us, the said committee, by the resolutions and orders aforesaid, that, laying aside all manner of business and excuses whatsoever, you be and appear forthwith, in your proper person, before us, the said committee, at the statehouse, in the city of Philadelphia, to be examined touching the premises, and to testify your knowledge therein: And that you bring with you all such papers and documents touching the same as may be in your hands and possession; and herein fail not, at your peril.

Given under our hands and seals at the city of Philadelphia, in committee aforesaid, the 10th day of July, in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
J. DAWSON.
ROBT. G. HARPER.
J. A. BAYARD.

2039. In the proceedings for the impeachment of William Blount, in 1797–8, the managers for the House of Representatives issued orders of arrest in form as follows: [24]

UNITED STATES, to wit:

To Capt. William Eaton.

Whereas the House of Representatives of the United States did, on the eighth day of July, in the year one thousand seven hundred and ninety-seven, come to the following resolution, viz:

[23] Fifth Congress, Annals, p. 2330.
[24] Fifth Congress, Annals, p. 2324.

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"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records."

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee pursuant to the said resolution."

You are hereby authorized and required, in pursuance of the said authority vested in us as aforesaid, taking to your assistance such person or persons as you may deem necessary, to make strict and diligent search for Nicholas Romayne, now or late of the State of New York, practitioner of medicine; and him having found, to seize and apprehend, and to bring, together with his papers, in safe custody, before us, the committee aforesaid, at the city of Philadelphia, to be examined touching the premises. And all officers, civil and military, and all faithful citizens of the United States are required to be aiding and assisting to you, as there shall be occasion.

Given under our hands and seals, in committee aforesaid, at Philadelphia, the ninth day of July, in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
SAML. W. DANA.
J. DAWSON.
ROBT. G. HARPER.

UNITED STATES, to wit:

To Major Thomas Lewis.

Whereas the House of Representatives of the United States did, on the eighth day of July, in the year of our Lord, one thousand seven hundred and ninety-seven, resolve as follows, to wit:

"*Resolved*, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

"*Ordered*, That Mr. Sitgreaves, Mr. Baldwin, Mr. Dana, Mr. Dawson, and Mr. Harper be a committee pursuant to the said resolution."

And whereas the House of Representatives of the United States did, on the tenth day of July, in the same year, resolve as follows, viz:

"*Resolved*, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

"*Resolved*, That the said committee be instructed to inquire, and, by all lawful means, to discover the whole nature and extent of the offense whereof the said William Blount stands impeached, and who are the parties and associates therein."

"*Ordered*, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be of the said committee in his stead."

You are hereby authorized and required, in pursuance of the said authority vested in us as aforesaid, taking to your assistance such person or persons as you may deem necessary to make strict and diligent search for Maj. James Grant, now or late of the State of Tennessee, and him having found, to seize and apprehend, and to bring, together with his papers, in safe custody, forthwith before us, the committee aforesaid, at the city of Philadelphia, to be examined touching the premises. And all officers, civil and military, and all faithful citizens of the United States, are required to be aiding and assisting to you as there shall be occasion.

Given under our hands and seals, in committee aforesaid, at Philadelphia, the tenth day of July in the year aforesaid.

S. SITGREAVES.
ABR. BALDWIN.
J. DAWSON.
R. G. HARPER.
J. A. BAYARD.

The chairman of the managers also, in connection with the first process; issued instructions as follows:

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To Capt. William Eaton.

SIR: You will proceed with the utmost expedition to New York, and, immediately on your arrival, see Mr. Harrison, or such other person as, in case of his absence, you are addressed to. Having advised with such person as to the proper mode of executing your commission, you will proceed, with such assistance as may be deemed necessary, to arrest the person expressed in your warrant, in the most secret manner, and to secure all his papers. Him and his papers you will then convey safely and expeditiously to this place.

When you see the person to be arrested, it will be proper to inform him that the committee is desirous of avoiding all unnecessary publicity, and that, by attending quietly with his papers, it may be prevented. You may let him understand at the same time that hesitation or resistance can have no other effect than to render the affair more disagreeable to him by making it public. On the road he will be treated by you as a fellow-passenger, but carefully attended to, and above all, the papers are to be most carefully guarded and kept in your own possession.

The same treatment may be observed toward any other person whom, with his papers, it may be resolved to arrest.

Whatever papers are seized you will immediately seal up in the presence of the person to whom they belong, if on the spot, or, if not, the presence of some other person, and will deliver them sealed to the committee.

It is scarcely necessary to add that the papers most likely to be important will be letters from William Blount, and copies of letters sent to him. Such must be diligently sought and carefully secured.

I am, sir, your most obedient servant,

S. SITGREAVES, *Chairman of the Committee.*

PHILADELPHIA, *July 9, 1797.*

2040. Form of discharge issued to a witness before the House committee which investigated the impeachment charges against William Blount.—In the proceedings for the impeachment of William Blount, in 1797–8, the managers of the House of Representatives issued a discharge to a witness in form as follows:[25]

These are to certify whom it may concern, that Dr. Nicholas Romayne, of the city of New York, having attended the committee of the House of Representatives of the United States, charged with the impeachment of William Blount, in pursuance of the process by them issued for that purpose, and having undergone such examination, and answered such interrogatories as were required and exhibited by the said committee; and having further entered into bonds for his appearance before the Senate of the United States as a witness on a trial of the said impeachment, has been, and hereby is, discharged by the said committee from any further attendance upon them.

Given in the committee aforesaid at the city of Philadelphia, on the twenty-second day of July, in the year of our Lord, one thousand seven hundred and ninety-seven.

By order of the committee.

S. SITGREAVES, *Chairman.*

2041. Form of subscription of witness to testimony and attestation thereof in examination preliminary to the Peck trial.—The Journal[26] of the Judiciary Committee, which in 1830 examined the charges against James H. Peck, judge of the United States court for the district of Missouri, shows that each witness subscribed to his testimony, which bore this further indorsement:

Sworn and subscribed before the Judiciary Committee on the — March, 1830.
Attest: JAMES BUCHANAN, *Chairman.*

The same form is found in later investigations.

2042. The House hearing attended when respondent's answer was read, it was held that the answer might not as of right be read again in the House during consideration of the replication.

[25] Fifth Congress, Annals, p. 2328.
[26] First session Twenty-first Congress, House Report, No. 325.

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The House may take official cognizance of a paper listened to by the Committee of the Whole in attendance on an impeachment trial.

On March 23, 1868,[27] the House was considering the proposed replication to the answer of President Johnson to the articles of impeachment presented against him in the Senate by the House. This answer had been transmitted to the House from the Senate by message.

Mr. John W. Chanler, of New York, rising to a parliamentary inquiry, asked if the answer of the President might be read.

The Speaker [28] said:

The Chair rules that the message from the Senate can be read, but the answer of the President can not be read upon the demand of any Member. * * * When the answer was read in the Senate, the House, in accordance with its own resolution, was in attendance there for the specific purpose of hearing the proceedings. It is therefore to be presumed that every Member of the House was present and heard the answer read.

Mr. Chanler having called attention to the fact that the House attended in Committee of the Whole, the Speaker said:

The Chair overrules the point made by the gentleman on the grounds that the House takes official cognizance of all proceedings in the Committee of the Whole as well as in the House; whether the Speaker or the chairman of the Committee of the Whole presides does not affect the question.

2043. During the Johnson trial the House considered matters pertinent thereto under suspension of the rules.—On March 16, 1868,[29] while proceedings for the impeachment of President Johnson were going on, the House, by suspension of the rules, considered and agreed to the following:

Resolved, That except during the morning hour on Monday the rules may be suspended during the pendency of the impeachment of the President to proceed to the consideration of any matter which may be reported by the managers on the part of the House of Representatives.

2044. Instance wherein the managers consulted the House as to a proposition that an impeachment trial be postponed.

The House having taken no action when consulted as to postponement of an impeachment trial, the managers left the decision to the court.

Instance wherein the managers of an impeachment made a verbal report to the House on a matter arising during the trial.

On June 17, 1876,[30] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, moved "that this cause be now continued until some convenient day in the month of November."

Mr. Manager Scott Lord said:

Mr. President and Senators, under circumstances which I need not now here detail, surrounding this case, the managers have concluded to ask leave on this motion to consult with the House. I will say now that whatever the conference with the House may result in and whatever the determination of the Senate may be we desire that the question of filing this paper shall be disposed of when there is a quorum; but on the question of postponement under all the

[27] Second session Fortieth Congress, Globe, pp. 2073, 2079, 2080.
[28] Schuyler Colfax, of Indiana, Speaker.
[29] Second session Fortieth Congress, Journal, pp. 530–532; Globe, pp. 1905, 1906.
[30] First session Forty-fourth Congress, Senate Journal, p. 953; Record of Trial, pp. 171, 172.

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circumstances in which we find ourselves placed and the case placed we desire leave to confer with the House.

The Senate evidently in order to permit this consultation at once adjourned.

On the same day [31] Mr. Manager Lord made a verbal report to the House of Representatives, and then, on behalf of the managers, proposed this resolution:

Whereas in the impeachment of William W. Belknap the defendant has moved for a continuance now on account of the lateness of the session, with the difficulty which will probably attend the retaining of a full organization of the court and the urgency of other business.

Resolved, That the managers be authorized to consent to a continuance until the — day of November next.

Considerable debate arose over this proposition, there being a manifest feeling that the Senate should assume the responsibility of the decision. Mr. Manager Lord, in response to an inquiry by Mr. Fernando Wood, of New York, said that undoubtedly the Senate, like any other court, had the absolute right to postpone the trial without the assent of the managers for the House, and Mr. Samuel J. Randall, of Pennsylvania, thereupon urged that as they had that power they should exercise it.

Mr. John H. Reagan, of Texas, proposed the following substitute for the proposition of the managers:

Resolved, That upon the information communicated by the managers with reference to the impeachment of W. W. Belknap, the House of Representatives, with renewed assurances of confidence in the managers to whom the conduct of the trial has been committed, authorize them to act upon the subject of their communication as to them shall under all the circumstances of the case seem proper.

A motion for the previous question showed an equal division of the House, the Speaker pro tempore casting the deciding vote on a vote by tellers. A disposition to resort to dilatory proceedings being manifested the House dropped the matter and proceeded to other business.

On the next day, in the Senate sitting for the trial, Mr. Manager Lord said:

Mr. President, in regard to the application of the defendant to adjourn the trial to November next, the managers have reported to the House the proceedings in the court of impeachment on Saturday last; the House has taken no action in the premises, and the managers therefore leave the question of such postponement with the court.

The Senate denied the application for a postponement.

2045. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.—On January 10, 1843,[32] Mr. John M. Botts, of Virginia, as a privileged subject, submitted the following:

I do impeach John Tyler, Vice-President, acting as President of the United States, of the following high crimes and misdemeanors:

First. I charge him with gross usurpation of power and violation of law in attempting to exercise a controlling influence over the accounting officers of the Treasury Department by ordering the payment of accounts of long standing that had been rejected for want of legal authority to pay, etc.

[31] House Journal, pp. 1116, 1117; Record, pp. 3871–3874.
[32] Third session Twenty-seventh Congress, Journal, p. 159; Globe, p. 145.

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[The arraignment continues at considerable length, there being nine charges in all.]

Mr. Horace Everett, of Vermont, submitted that the proposition of Mr. Botts did not take precedence on the ground of privilege, and therefore was not in order according to the routine of business as established by the rule.

The Speaker [33] decided that as by the Constitution it was a privilege of the House of Representatives to institute proceedings against the President, he considered that the present was a privileged proceeding and should take precedence of all other proceedings.

The record of debates gives the Speaker's explanation for his ruling. He said that since the present Speaker had been in the chair there had been no case of this kind before the House, and only two cases since the beginning of the Government. The first was that of Chief Justice Chase,[34] in which no question like the one now raised was presented. That case was then considered and acted upon by the House as a privileged question. Mr. Randolph rose in his seat, and, without any resolution or specific charges, after some remarks on the conduct of Judge Chase, moved for a committee to take into consideration the propriety of impeaching him. The matter went on day after day, and by the universal acquiescence of the House took preference of all other business as a privileged question. In addition to this the Chair considered this a high constitutional question, paramount to all others, without reference to the rules of the House.[35]

2046. On January 7, 1867,[36] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted the following:

I do impeach Andrew Johnson, Vice-President and Acting President of the United States, of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law—

In that he has corruptly used the appointing power;

In that he has corruptly used the pardoning power;

In that he has corruptly used the veto power;

In that he has corruptly disposed of public property of the United States;

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors: Therefore,

Be it resolved, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to the House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any Department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

Mr. William E. Finck, of Ohio, made a point of order, questioning whether the matter was privileged.

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[33] John White, of Kentucky, Speaker.

[34] See section 2342 of this volume.

[35] The Constitution provides: "The House of Representatives shall have the sole power of impeachment." (Art. I, section 2.)

"The President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." (Art. II, section 4.)

[36] Second session, Thirty-ninth Congress, Journal, p. 121; Globe, p. 320.

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The Speaker[37] ruled that it was privileged, saying that in the Twenty-seventh Congress, by the then Speaker, it was decided, on the point raised by Horace Everett, of Vermont, that it was a question of privilege.[38]

2047. On December 2, 1884.[39] Mr. John F. Follett, of Ohio, submitted as a matter of privilege the following:

I do impeach Lot Wright, United States marshal of the southern district of Ohio, of high crimes and misdemeanors.

I charge him with usurpation of power and violation of law—

In that he appointed a large number of general and special deputy marshals to serve at the several voting precincts in the city of Cincinnati, in the State of Ohio, at an election of Members of Congress held in said city on the 14th day of October, A.D. 1884, and armed said deputy marshals with pistols and other deadly weapons, said to have been furnished by the War Department of the United States Government, etc., * * * Therefore,

Resolved, That the Committee on Expenditures in the Department of Justice be required and directed, as soon as the same can reasonably be done, to investigate such charges and report to this House—

First. How many deputy marshals, general and special, were appointed and authorized by said United States marshal for the southern district of Ohio, etc. * * *

Resolved, That in making such investigation the said committee be empowered to appoint a subcommittee of three, consisting of the chairman of said committee and such other two members thereof as he may select, which subcommittee shall have full power to meet and hold its sessions at such times and places as may seem proper, to send for persons and papers, to compel the attendance of witnesses and to require them to testify, to employ a stenographer, and to incur any and all such necessary and reasonable expenditures as may be deemed requisite for the purposes of such investigation, such expenditures to be paid out of the contingent fund of the House.

Mr. J. Warren Keifer, of Ohio, made the point of order that the resolutions were not in order.

After debate the Speaker[40] said:

The present occupant of the chair decided during the last session of Congress that a mere proposition to investigate the conduct of a public officer, without proposing to impeach him, was not a matter of privilege under the rules of the House or under the Constitution of the United States; and the Chair has seen no reason to change that opinion. But the gentleman from Ohio (Mr. Keifer) is mistaken in his statement that the resolution now offered does not contain a proposition for impeachment. The resolution begins with an impeachment of this officer; and all that follows is a mere specification under the general charge made, together with a direction to a committee to make the investigation usual in such cases. The proceeding corresponds precisely with that adopted in the Twenty-seventh Congress, when an attempt was made to impeach the then President, John Tyler, and adopted afterwards in the Thirty-ninth Congress, when Mr. Ashley, then a Member from Ohio, rose in his place on the floor, made charges against the then President, Andrew Johnson, and asked for an investigation. * * * It is admitted that the resolution now offered does contain a proposition to impeach a public officer who is impeachable under the Constitution; but it is insisted that it does not present a matter of privilege under the Constitution or rules of the House, because, in the first place, it contains other matter; that is to say, it directs the committee to take certain evidence in the case which it is claimed is not pertinent to the charges made.

It may be, or it may not be, that the resolution does direct the committee to take what the House might afterwards decide to be incompetent evidence upon a charge of this character. But that, of course, is not a question for the Chair to determine. It is the province of the House to decide, when the resolution comes before it, how far it shall direct the committee to proceed in the investigation or as to what charges it shall investigate.

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[37] Schuyler Colfax, of Indiana, Speaker.

[38] Other resolutions were presented on the same subject, but not as questions of privilege. Journal, second session Thirty-ninth Congress, pp. 118, 119.

[39] Second session Forty-eighth Congress, Journal, pp. 27, 28; Record, pp. 17–19.

[40] John G. Carlisle, of Kentucky, Speaker.

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Again, it is objected that this inquiry should be made by the Committee on the Judiciary, and not by the Committee on Expenditures in the Department of Justice. Of course, if a proposition to impeach a public officer should be submitted to the Chair for reference, the Chair, under the rules of the House, would send it to the Committee on the Judiciary; but it is always in the power of the House itself to determine what committee shall conduct an investigation or consider and report upon any matter. So it seems to the Chair that under all of the rulings heretofore made this presents a matter of privilege, and the House can determine for itself how far the committee shall proceed in the investigation, what committee shall have charge of it, and what matters shall be investigated.

2048. On December 10, 1895,[41] Mr. William E. Barrett, of Massachusetts, presented as a question of privilege the following:

I do impeach Thomas F. Bayard, United States ambassador to Great Britain, of high crimes and misdemeanors on the following grounds:

Whereas the following report of a speech, delivered before the Edinburgh Philosophic Institution, by Hon. Thomas F. Bayard, ambassador of the United States of America at the Court of Great Britain, is published in the London News under date of November 8, 1895:

"The opening address of the Edinburgh Philosophic Institution was delivered last night by Mr. Bayard, the ambassador of the United States of America, who selected for the subject 'Individual freedom the germ of national progress and permanence.' In his own country, he said, he had witnessed the insatiable growth of that form of State socialism styled 'protection' which he believed had done more to foster class legislation and create inequality of fortune, to corrupt public life, to banish men of independent mind and character from the public councils, to lower the tone of national representation, blunt public conscience, create false standards in the popular mind, to familiarize it with reliance upon State aid and guardianship in private affairs, divorce ethics from politics, and place politics upon the low level of a mercenary scramble than any other single cause." etc. [The extract is quoted at length.]

And whereas such reflections on the Government's policy and people of the United States by an ambassador of the United States to a foreign country and before a foreign audience is manifestly in serious disregard of the proprieties and obligations which should be observed by an official representative of the United States abroad, and calculated to injure our national reputation.

Be it resolved by the House of Representatives, That the Committee on Foreign Relations be directed to ascertain whether such statements have been publicly made; and, if so, to report to the House such action, by impeachment or otherwise, as shall be proper in the premises. For the purpose of this inquiry the committee is authorized to send for persons and papers.

Mr. Charles F. Crisp, of Georgia, made the point of order that this did not constitute a question of privilege.

During the debate the precedents of February 4 and December 2, 1884,[42] were cited. The Speaker,[43] in ruling, said:

It seems to the Chair that there is a great distinction between the two cases. The Chair has examined the decision of the Speaker of the House made on the 2d day of December, 1884, and sees no reason why he should not adopt that opinion. The Chair therefore overrules the point of order.[44]

2049. Although a report as to an impeachment be laid on the table, the right to move again an impeachment in the same case is not precluded.—On December 6, 1867,[45] the House was considering the report of the Judiciary Committee recommending the impeachment of Andrew Johnson.

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[41] First session Fifty-fourth Congress, Journal, p. 37; Record, p. 115.
[42] See sections 2047 and 2050.
[43] Thomas B. Reed, of Maine, Speaker.
[44] For a similar instance wherein Mr. Speaker Colfax held that a proposition to impeach Charles Francis Adams, minister to England, was privileged, see Globe, first session Fortieth Congress, pp. 778, 779.
[45] Second session Fortieth Congress, Globe, p. 65.

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Mr. John F. Farnsworth, of Illinois, rising to a parliamentary inquiry, asked whether, if the subject be laid on the table, it would prevent any gentleman from calling it up as a question of privilege and moving the impeachment of the President.

The Speaker [46] said:

If this subject be laid on the table, no gentleman can call up this report. He can propose to impeach the President or any other officer of the Government on any day during the session, and that could be done even though the President should have been impeached and acquitted by the Senate.

2050. A mere proposition to investigate the conduct of a civil officer is not presented as a matter of constitutional privilege, even though impeachment may be contemplated as a possibility.—On February 4, 1884,[47] Mr. William M. Springer, of Illinois, presented the following resolution, claiming it to be a question of privilege:

Resolved, That the petition of Richard W. Webb, and accompanying statement of charges against Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district thereof, be referred to the Committee on the Judiciary and printed, and that the Committee on the Judiciary be directed to inquire and ascertain whether the allegations * * * be true, * * * and report thereon to the House such action, to be taken by impeachment or otherwise, as they may advise; and in making such examination and investigation the said committee have power to send for persons and papers.

Mr. John A. Kasson, of Iowa, made the point that this was not such a question as enabled the memorial to have present consideration. If it were entitled to consideration, one person who might or might not be responsible might spread before the country charges which had not been examined by any committee.

In sustaining the point of order the Speaker [48] said:

The Chair will state that, having looked at the memorial, he finds that it does contain charges against a judge of the United States court in the Territory of New Mexico. Upon that the gentleman from Illinois offers a resolution that the memorial and charges be referred to the Committee on the Judiciary for investigation. The question is made that this is not a matter of privilege. * * * If a Member on the floor should prefer articles of impeachment against a public officer the Chair has no doubt that it would be a privileged matter under the Constitution, because the House possesses the power of impeachment. But this is not a resolution proposing to impeach anyone. It simply instructs the Committee on the Judiciary to inquire into the truth or falsity of certain charges made against a public officer in a memorial which has been presented. The inquiry may result in an impeachment or it may not.

2051. A resolution directly proposing impeachment is privileged; but the same is not true of one proposing investigation with a view to impeachment.—On December 2, 1867,[49] Mr. William E. Robinson, of New York, claiming the floor for a question of privilege, offered the following resolution:

Resolved, That the Committee on Foreign Affairs be instructed to inquire into the conduct of William B. West, American consul at Dublin, in Ireland, regarding American prisoners in that city and to report thereon forthwith, to the end that if he has been guilty of conduct which would be liable to impeachment this House may take measures to have articles of impeachment presented to the Senate.

Mr. John F. Farnsworth, of Illinois, made the point of order that this did not involve a question of privilege.

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[46] Schuyler Colfax, of Indiana, Speaker.
[47] First session Forty-eighth Congress, Journal, p. 495; Record, p. 871.
[48] John G. Carlisle, of Kentucky, Speaker.
[49] Second session Fortieth Congress, Journal, p. 9; Globe, p. 4.

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The Speaker [50] said:

The gentleman from Illinois rises to a question of order, that as the resolution does not positively propose impeachment of this consul it is not a question of privilege. The Chair sustains the point of order.

Thereupon Mr. Robinson modified his resolution to read as follows:

Resolved, That William B. West, consul of the United States at Dublin, Ireland, be impeached before the Senate.

The Speaker said:

That is a question of privilege, and can be introduced for reference or action.

The resolution was referred to the Committee on Foreign Affairs.

2052. On November 21, 1867,[51] Mr. William E. Robinson, of New York, as a question of privilege, submitted the following resolution:

Whereas Charles Francis Adams, United States minister to Great Britain, has been charged with neglect of duty toward American citizens in England and Ireland by failing to secure their rights as such citizens: Therefore,

Be it resolved, That the Committee on Foreign Affairs be instructed to inquire into the foregoing charge and to report thereon forthwith, to the end that, if the charge be true, articles of impeachment against said Charles Francis Adams may be presented by this House to the Senate of the United States; that the President of the United States be requested to telegraph to the said Charles Francis Adams immediately to demand his passports and to return home; that the Secretary of State be instructed to communicate to this House all correspondence to and from the Department for the two years last past on the arrest, imprisonment, trial, or conviction of any American citizen, or any person claiming to be such, in Great Britain and Ireland, without reference to its public effect to be considered, if need be, in secret session of this House.

The resolution having been read, the Speaker [52] said:

The Chair rules that this resolution is a question of privilege, as it proposes an impeachment of an officer of the Government.

2053. Impeachment is a question of constitutional privilege which may be presented at any time irrespective of previous action of the House.—On March 3, 1879,[53] the regular order of business was the report of the Committee on Expenditures in the State Department proposing articles of impeachment against George F. Seward, late consul-general at Shanghai, China, and now minister plenipotentiary to China.

Mr. Omar D. Conger, of Michigan, made the point of order that the House having referred the subject-matter of the investigation of charges against Mr. Seward to the Committee on the Judiciary it was not in order for the Committee on Expenditures in the State Department to take further action on the case.

The Speaker [54] overruled the point of order on the ground that the subject referred to the Committee on the Judiciary was the answer of the said Seward in response to the order of the House requiring him to show cause why he should not be declared in contempt of the House, and also on the further ground that the question of impeachment was one of constitutional privilege which could be raised or presented at any time by any Member of the House.

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[50] Schuyler Colfax, of Indiana, Speaker.
[51] First session Fortieth Congress, Journal, p. 256; Globe, p. 778.
[52] Schuyler Colfax, of Indiana, Speaker.
[53] Third session Forty-fifth Congress, Journal, p. 621; Record, pp. 2347, 2348.
[54] Samuel J. Randall, of Pennsylvania, Speaker.

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2054. A resolution for discontinuing impeachment proceedings, but not respectful to the House, was ruled not to be privileged.—On May 18, 1868,[55] Mr. Alexander H. Jones, of North Carolina, offered as involving a question of privilege, the following:

Whereas this House did in bad judgment and hot haste pass a resolution and articles of impeachment against Andrew Johnson, President of the United States, and appointed managers to conduct the suit before the high court of the Senate; and whereas it has been abundantly proven that there was no cause or plausible pretext for the same; and whereas the Senate and the country labor under great excitement and embarrassment: Therefore,

Be it resolved, That said managers be instructed forthwith to withdraw said suit, that the House may be redeemed, the Senate relieved, and the country given repose.

Mr. Elihu Washburne, of Illinois, having objected, the Speaker[56] held:

The Chair will rule on the question. He thinks this is not a question of privilege. The preamble contains a reflection on the House. It is unparliamentary on the part of any Member to reflect upon the action of the House in the language used in the preamble. * * * It is not a parliamentary preamble and resolution for the consideration of the House, not being respectful in its terms to the House.

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[55] Second session Fortieth Congress, Globe, p. 2259.
[56] Schuyler Colfax, of Indiana, Speaker.

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Function of the Senate in Impeachment*

1. Provision of the Constitution. Section 2055.[1]
2. English precedents as to function of House of Lords. Section 2056.[2]
3. Does the Senate sit as a court. Sections 2057, 2058.[3]
4. Assumes jurisdiction by a major vote. Section 2059.
5. Competency as related to vacant seats. Section 2060.
6. Challenge for disqualifying personal interest. Sections 2061, 2062.
7. The quorum. Section 2063.
8. Relations to the House. Section 2064.
9. The presiding officer. Sections 2065, 2067.[4]
10. Duration of trial. Section 2068.

2055. The sole power of trying impeachments is conferred on the Senate by the Constitution.

Senators sitting for an impeachment trial are required by the Constitution to be on oath or affirmation.

The Constitution requires the Chief Justice to preside when the President of the United States is tried before the Senate.

"Two-thirds of the Members present" are required by the Constitution for conviction on impeachment.

The Constitution limits judgment in impeachment cases to removal from office and disqualification to hold office.

A person convicted in an impeachment trial is still liable, under the Constitution, to the punishment of the courts of law.

The Constitution, in Article I, section 3, provides:

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present.

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

2056. Under the parliamentary law the Lords are the judges and may not impeach or join in the accusation.

The Lords may not, under the parliamentary law, proceed by

*Hinds' Precedents, vol. 3, p. 377.

[1] Senate asserts that it has the sole power to regulate the forms and procedure of the trial. Section 2324 of this volume.

Discussion of the Senate's power to enforce final judgment. Section 2158.

[2] In England the judgment of the Lords is given in accordance with the law of the land. Section 2155.

[3] Does the Senate sit as a court? Sections 2079, 2082, 2126, 2270, 2307.

Objections of Senators to evidence. Section 2268.

[4] See also, on subject of the presiding officer, subjects as follows: Functions and powers, sections 2082–2089; His decisions, sections 2084, 2193–2195, 2222; Directs preparation of Senate Chamber for a trial, section 2084; Chief Justice presides at trial of President, section 2082; Introduction of the Chief Justice, sections, 2421, 2422; Chief Justice not required to be sworn, section 2080; As to the vote of the Chief Justice, section 2098.

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impeachment against a Commoner, except on complaint of the Commons.

Provisions of parliamentary law as to trial by impeachment of a Commoner for a capital offense.

In Chapter LIII, of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Jurisdiction. The Lords can not impeach any to themselves, nor join in the accusation, because they are the judges. (Seld. Judic. in Parl., 12, 63.) Nor can they proceed against a Commoner but on complaint of the Commons. (Ib., 84.) The Lords may not, by the law, try a Commoner for a capital offense, on the information of the King or a private person, because the accused is entitled to a trial by his peers generally; but on accusation by the House of Commons they may proceed against the delinquent, of whatsoever degree and whatsoever be the nature of the offense; for there they do not assume to themselves trial at common law. The Commons are then instead of a jury, and the judgment is given on their demand, which is instead of a verdict. So the Lords do only judge, but not try the delinquent. (Ib., 6, 7.) But Wooddeson denies that a Commoner can now be charged capitally before the Lords, even by the Commons, and cites Fitzharris's case, 1681, impeached for high treason, where the lords remitted the prosecution to the inferior court. (8 Grey's Deb., 325–327; 2 Wooddeson, 576, 601; 3 Seld., 1604, 1610, 1618, 1619, 1641; 4 Blackst., 25; 9 Seld., 1656; 73 Seld., 1604–1618.)

2057. In 1868, after mature consideration, the Senate decided that it sat for impeachment trials as the Senate and not as a court.

An anxiety lest the Chief Justice might have a vote seems to have led the Senate to drop the words "high court of impeachment" from its rules.

The Senate, as a Senate and not as a court, adopted rules for the Johnson trial; but on the insistence of the Chief Justice adopted them when organized for the trial.

In the Johnson trial the articles of impeachment were presented before the Chief Justice had taken his seat, although he had filed his written dissent from such procedure.

Written dissent of the Chief Justice from views taken by the Senate as to its constitutional functions in an impeachment trial.

Enunciation of Mr. Senator Summer's theory that the Senate was not a court and the Senators were not constrained by the obligations of judges in an impeachment trial.

On February 29, 1868,[5] the Senate, in its legislative capacity and before its organization for impeachment proceedings, began the consideration of a series of rules reported [6] by a select committee composed of Messrs. Jacob M. Howard, of Michigan; Lyman Trumbull, of Illinois; Roscoe Conkling, of New York; George F. Edmunds, of Vermont; Oliver P. Morton, of Indiana; Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland. The caption of this report was "Rules of Procedure and Practice in the Senate when Sitting as a High Court of Impeachment." At the outset of the discussion [7] Mr. Thomas A. Hendricks, of Indiana, made the objection that the rules not only proposed the method for organizing the Senate into a court, but also proposed regulations for the court itself. He conceived that it was not

[5] Second session Fortieth Congress, Senate Journal, p. 236; Globe, p. 1515.
[6] Senate Report No. 59.
[7] Globe, pp. 1520, 1521.

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proper for the Senate as such to adopt rules to control the action of the court upon any question whatever that might become material during the trial.

During the discussion of the rules themselves, Mr. Oliver P. Morton, of Indiana, acting upon suggestions received since he had concurred in the report, called attention [8] to the use of the words "high court of impeachment" in Rules III and IV as submitted:

They both used language which may, perhaps, lead to trouble, and give rise to a different theory in regard to the character of the body that is to try this impeachment. It is provided that the Senate shall resolve itself into a high court of impeachment. Is there any authority in the Constitution for that, or is there any propriety in it? Is not this impeachment to be tried simply by the Senate of the United States? While the Senate is engaged in the trial, does it lose the character of the Senate and become a court? If we shall allow ourselves to contemplate that idea, may it not lead to consequences that we do not desire, and to difficulties? The Constitution seems to contemplate that this impeachment shall be tried by the Senate. It says: "The Senate shall have the sole power to try all impeachments," and "when sitting"—that is, the Senate, when sitting—"for that purpose they shall be on oath or affirmation." That is all that is required, that the Senate, when sitting for that purpose, shall be on oath or affirmation. But we are here proposing to resolve ourselves into another character, we are to cease to be a Senate and become a court. If we follow out that theory, there may be many little consequences attaching to it before we get done with it that we do not anticipate. Why not preserve the simple idea that this impeachment is to be tried by the Senate of the United States as the Senate and nothing else? What use have we got for the phraseology "resolving itself into a high court of impeachment?" I object to the use of the word "high," in that connection, anyhow. But the argument made by my colleague suggests that the theory which we thus seem to recognize may involve other consequences that we do not now contemplate; and although I assented to these rules, and would regret now to find fault, yet it occurs to me, from the suggestion made and from looking at the Constitution itself, that this impeachment, after all, is to be tried simply by the Senate of the United States.

Debate at once arose [9] and there was a citation of precedents to show that in former impeachment trials the words "high court of impeachment" had been used, although Mr. Conkling argued that these words had been used rather by the Secretary in recording the proceedings than by the Senate itself.

Mr. Orris S. Ferry, of Connecticut, moved to strike out the word "high," and announced that if that should be agreed to, he would propose further amendments with the object of removing the idea that the Senate was in such proceedings a distinct court.

Mr. Ferry's motion was disagreed to,[10] yeas 16, nays 21.

The question was not settled by this vote, however, but recurred again and again. On March 2,[11] Mr. Hendricks proposed an additional rule, as follows:

When the Senate sits as a high court of impeachment in a case in which the Chief Justice must preside, such of the foregoing rules as apply to the trial shall be considered and adopted by the court before they shall have force.

In support of his motion Mr. Hendricks argued:

I am not able to see that there ought to be a doubt on this question. If the Chief Justice must preside when the Senate shall try the case, he sought to preside when the Senate decides how it will try the case, what forms of proceeding shall be observed, what rights shall be secured to counsel, what rights shall be reserved to Senators. Many of these rules are exceedingly important.

[8] Globe, p. 1521.
[9] Globe, pp. 1521–1526.
[10] Senate Journal, p. 237; Globe, p. 1526.
[11] Senate Journal, p. 244; Globe, pp. 1589, 1590.

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* * * If the Constitution provides that the Chief Justice must preside here, and that this must be a court with the Chief Justice as the presiding officer when the trial takes place, ought we not to decide how the case shall be tried when he is in his seat? In a case where the Chief Justice must preside, is it proper that the Senate, in his absence, when the Vice-President or President pro tempore is occupying the chair, who may succeed in case the impeachment is successful—is it right with that organization of the Senate to prescribe the rules which shall govern the court which the Constitution itself provides for?

* * * These rules, among other things, confer upon the Chief Justice presiding the power to decide certain questions, questions of the admissibility of evidence. These may be very important. It is conferring upon him a power which he would not possess in the absence of the rule. Now, that is a power which he is to exercise in the court, which we confer upon him when not organized into the court and not under oath.

In reply Mr. Timothy O. Howe, of Wisconsin, suggested that the Chief Justice would have no vote in adopting the rules, and as to his decisions on the admissibility of evidence, he said:

We confer that power upon him in pursuance of the authority of the Senate to make rules for its government in any particular in which the Senate may be called upon to act, as the Constitution says we may. Now, in any possible contingency, if we have the authority at any time to confer the power mentioned in the seventh rule upon the presiding officer, does it make any possible difference whether we do it to-day or to-morrow, whether we do it when the Chief Justice is here or when he is absent. If I could see that it did, I might hesitate upon the point; but as the same identical individuals are to do the thing whenever it is done, I can not for my life see what difference it can make whether it is done on one day or another.

The amendment proposed by Mr. Hendricks was disagreed to without division.

Immediately thereafter [12] Rule XXIV was read, prescribing forms for subpoenas of witnesses and of the summons to the person impeached. In these forms occurred the words "Senate of the United States, sitting as a high court of impeachment." Mr. Conkling moved to strike out the words "sitting as a high court of impeachment" wherever they occurred.

This motion was agreed to without very extended debate, Mr. Cronkling stating that if his amendment should be adopted it would restore the forms to what they were in the trials of 1804, 1830, and 1862. Mr. Edmunds explained that the words objected to had been introduced to get a form applicable to all conditions, whether the Chief Justice, a Vice-President, or a President pro tempore should preside.

Mr. Conkling's motion was agreed to yeas 23, nays 12. This was not, however, regarded as very significant on the question as to the nature of the court. Mr. John Sherman, of Ohio, who voted for the motion, but championed the idea that the words high court should be retained as descriptive of the body, said that he did not consider it necessary, in summoning a witness, to inform him that the Senate was sitting as a high court of impeachment.

But on Rule XXV Mr. Conkling brought the question to issue [13] by moving an amendment which struck out the word "court."

Mr. Sherman said:

That this Senate is a court when it proceeds to try a case I think it does not need any very long speech to prove. We examine witnesses; we convict or acquit;

[12] Senate Journal, p. 246; Globe, pp. 1591, 1592.

[13] Senate Journal, p. 246; Globe, pp. 1593-1594. There is a discrepancy between the Journal and Globe, but the debate shows that the Globe must be correct.

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we try a case; we are sworn; and if there is any element of a trial or any idea of a court that does not enter into our organization I do not know what it can be.

Mr. Conkling said:

The Constitution says that the Senate shall have the sole power to try all impeachments. It does not say that the Senate shall become a court ex officio; it does not say that there shall be a high court for the trial of impeachment, to be composed of the Senate and of the Chief Justice sitting ex officio. It says nothing of that kind, but simply that the Senate shall try all impeachments. Why not leave it there? If it is a court we do not destroy that character by omitting these superfluities from our rules. If it is not a court we do not clothe it with the ermine or the attributes of a court by putting in the rules that it is so.

Then why not take the thing precisely as we find it?

Mr. Edmunds said:

It is a matter of some regret to me and to those of us who differed from my friend from New York in committee, where we thought we had settled the matter, that he is not willing to take the decision of the Senate on Saturday, when we were pretty full, upon this very question, instead of bringing it up again now, after we have gone through with this whole thing. Of course he is perfectly justified in doing so if he thinks the importance of it demands that course on his part; but I am a little afraid that his fear of the canal board in his State being turned into a court has led him to be a little touchy on this subject.

On Saturday, it will be remembered, this very question was debated at great length, not an unnecessary length, but every gentleman expressed his views who chose to do so, and gave his reasons for them, and the precedents were referred to; and then upon the yeas and nays on the question of striking out the word "high" (in connection with which it was expressly stated by the Senator from Connecticut that if he succeeded in that he should follow it by the other motions which would leave the description of the body to be simply "the Senate," because it would be easier to get an affirmative vote upon striking out a word, which was, of course, a mere matter of form, than it would upon the whole) the proposition was voted down, and voted down upon a reference to the precedents.

I hold in my hand the Globe, showing those proceedings; and the first was the trial of Blount, in 1798, in which—I ask the attention of the Senator from New York to it—the formal resolution—not the entry of the Secretary, but the resolution of the Senate as offered and adopted—was "resolved, that at the next opening of the court of impeachment the president" shall do so and so. Then, when we come to the trial of Chase, which was referred to also in some parts of the proceedings, the expression "court of impeachment" appears only to be the entry of the Secretary, but in other parts of the proceedings it appears to be the judgment of the Senate itself. Then, when we come to the trial of Peck, on the question of the Senate's taking upon itself a judicial capacity, the formal resolution offered on the part of the committee appointed by the Senate to report rules in that case was:

"*Resolved*, That at 12 o'clock to-morrow the Senate will resolve itself into a court of impeachment."

So that we find ourselves from the beginning, in 1798, down to this time—and the case of Humphreys in 1862 is just the same—having adopted this phraseology as describing the Senate, when it was exercising this function, as sitting as a court, saying nothing now about the word "high." Then where is the use, after all the discussion we have had on this point and one decision of it in the face of these uniform precedents from the beginning to this time, of turning our faces back and oversetting the whole theory upon which these rules go?

Mr. Ferry said:

Whether the Senate, sitting for the trial of impeachments, be a court or not in ordinary language, whether that term as ordinarily used may properly enough be applied to it is one thing. Whether the Constitution calls it a court and designates it as a court is another thing. If that tribunal be a court according to the Constitution, I would like to have Senators who desire to retain this phraseology point out to me a statute on the face of the earth designating the presiding officer of the court in which a presiding officer has not somewhat more functions than Senators seems to be willing to attribute to the presiding

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officer of this court of impeachment. And I feel thus because I wish to preserve simply to the Senate—not in relation to this particular case; I care nothing about it in this particular case one way or the other—but to preserve to the Senate, and the Members of the Senate only, their constitutional functions without interference from outside. As I suggested before, it is not worth while for me to go over the argument again, because, using this language in the rules which we are prescribing, we ourselves prejudge the question and estop ourselves. As it seems to me, by declaring that the Constitution makes this tribunal a court in the legal, constitutional signification of the term, we estop ourselves from claiming that none other than a Senator is a member of that court.[14]

To this Mr. Edmunds retorted:

I ask him if he does not know that the House of Lords in England from time immemorial has always been called the high court of Parliament; and if he does not know that in proceedings in impeachment in that court the lord chancellor or lord high steward, the president of the court, has no vote unless he be a member of that court by being a peer, by the constant practice and frequent decision of that body?

Mr. Conkling's motion was then agreed to—yeas 16, nays 13.

Then the rules were generally amended, on motion of Mr. Ferry, in such a way as to remove the word "court" or "high court of impeachment" wherever occurring,[15] and were agreed to.

On March 4 [16] the Senate met, and the President pro tempore laid before them the following communication:

To the Senate of the United States:

Inasmuch as the sole power to try impeachments is vested by the Constitution in the Senate, and it is made the duty of the Chief Justice to preside when the President is on trial, I take the liberty of submitting, very respectfully, some observations in respect to the proper mode of proceeding from the impeachment which has been preferred by the House of Representatives against the President now in office.

That when the Senate sits for the trial of an impeachment it sits as a court seems unquestionable.

That for the trial of an impeachment of the President, this court must be constituted of the Members of the Senate, with the Chief Justice presiding, seems equally unquestionable.

The Federalist is regarded as the highest contemporary authority on the construction of the Constitution; and in the sixty-fourth number the functions of the Senate "sitting in their judicial capacity as a court for the trial of impeachments" are examined.

In a paragraph explaining the reasons for not uniting "the Supreme Court with the Senate in the formation of the court of impeachments" it is observed that "to a certain extent the benefits of that union will be obtained from making the Chief Justice of the Supreme Court the president of the court of impeachments, as is proposed in the plan of the convention, while the inconveniences of an entire incorporation of the former into the latter will be substantially avoided. This was, perhaps, the prudent mean."

This authority seems to leave no doubt upon either of the propositions just stated. And the statement of them will serve to introduce the question upon which I think it my duty to state the result of my reflections to the Senate, namely, at what period, in the case of an impeachment of the President, should the court of impeachment be organized under oath as directed by the Constitution?

It will readily suggest itself to anyone who reflects upon the abilities and the learning in the law which distinguish so many Senators that besides the reason assigned in the Federalist there must have been still another for the provision requiring the Chief Justice to preside in the court of impeachment. Under the Constitution, in case of a vacancy in the office of President, the Vice President

[14] The discussion as to whether the Chief Justice would have a vote in the proceedings had already taken place (Globe, pp. 1585–1588) and had suggested the allied question of the nature of the Senate in this function.

[15] Senate Journal, p. 248; Globe, p. 1602.

[16] Senate Journal, pp. 798–800; Globe, p. 1644.

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succeeds; and it was doubtless thought prudent and befitting that the next in succession should not preside in a proceeding through which a vacancy might be created.

It is not doubted that the Senate, while sitting in its ordinary capacity, must necessarily receive from the House of Representatives some notice of its intention to impeach the President at its bar; but it does not seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should precede the actual announcement of the impeachment on the part of the House.

And it may perhaps be thought a still less unwarranted opinion that articles of impeachment should only be presented to a court of impeachment; that no summons or other process should issue except from the organized court, and that rules for the government of the proceedings of such a court should be framed only by the court itself.

I have found myself unable to come to any other conclusions than these. I can assign no reason for requiring the Senate to organize as a court under any other than its ordinary presiding officer for the later proceedings upon an impeachment of the President which does not seem to me to apply equally to the earlier.

I am informed that the Senate has proceeded upon other views; and it is not my purpose to contest what its superior wisdom may have directed.

All good citizens will fervently pray that no occasion may ever arise when the grave proceedings now in progress will be cited as a precedent; but it is not impossible that such an occasion may come.

Inasmuch, therefore, as the Constitution has charged the Chief Justice with an important function in the trial of an impeachment of the President, it has seemed to me fitting and obligatory, where he is unable to concur in the views of the Senate concerning matters essential to the trial, that his respectful dissent should appear.

S. P. CHASE,
Chief Justice of the United States.

WASHINGTON, *March 4, 1868.*

This letter was referred to the select committee of which Mr. Howard was chairman.

Soon thereafter the managers presented themselves with the articles of impeachment, and delivered them to the Senate, the President pro tempore presiding.[17]

Then,[18] after the intervention of legislative business, the Senate agreed to the necessary resolutions for notifying the House of Representatives and the Chief Justice that on the following day "the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States," etc.

A resolution providing that a printed copy of the rules be furnished to the House of Representatives was agreed to, although Mr. Charles R. Buckalew, of Pennsylvania, objected that this should not be done until the court had been organized and had determined on rules.

On March 6,[19] after the organization for the trial of the articles of impeachment, the Chief Justice said, before putting the question on a resolution notifying the House of Representatives of the organization:

The Chair feels it his duty to submit a question to the Senate relative to the rules of proceeding. In the judgment of the Chief Justice the Senate is now organized as a distinct body from the Senate sitting in its legislative capacity. It performs a distinct function; the members are under a different oath; and the presiding officer is not the President pro tempore of the Senate, but the Chief Justice of the United States. Under these circumstances, the Chair conceives

[17] Senate Journal, pp. 800–807; Globe, pp. 1647–1649.
[18] Globe, pp. 1657–1658; Senate Journal, pp. 807, 808.
[19] Senate Journal, p. 811; Globe, p. 1701.

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that rules adopted by the Senate in its legislative capacity are not rules for the government of the Senate sitting for the trial of an impeachment unless they be also adopted by that body. In this judgment of the Chair, if it be an erroneous one, he desires to be corrected by the judgment of the court, or of the Senate sitting for the trial of the impeachment of the President, which in his judgment are synonymous terms, and therefore, if he may be permitted to do so, he will take the sense of the Senate upon this question, whether the rules adopted on the 2d of March, a copy of which is now lying before him, shall be considered the rules of proceeding in this body. ["Question!"] Senators, you who think that the rules of proceeding adopted on the 2d of March should be considered as the rules of proceeding of this body will say "ay;" contrary opinion, "no." [The Senators having answered.] The ayes have it by the sound. The rules will be considered as the rules of proceeding in this body.

The journal of the Senate, in referring to proceedings in the trial, also refrains from the use of the words "high court of impeachment." [20]

The Chief Justice, however, in opening the daily sittings, directed the Sergeant-at-Arms to "open the court by proclamation." [21]

The answer of the President was also addressed to the "Senate of the United States, sitting as a court of impeachment." [22]

On June 3, 1868,[23] after the trial of the President had been concluded, Mr. Charles Sumner, of Massachusetts, presented to the Senate the following resolutions declaring the constitutional responsibility of Senators for their votes on impeachment:

Whereas a pretension has been put forth to the effect that the vote of a Senator on an impeachment is so far different in character from his vote on any other question that the people have no right to criticise or consider it; and whereas such pretension, if not discountenanced, is calculated to impair that freedom of judgment which belongs to the people on all that is done by their Representatives: Therefore, in order to remove all doubts on this question and to declare the constitutional right of the people in cases of impeachment—

1. *Resolved*, That, even assuming that the Senate is a court in the exercise of judicial power, Senators can not claim that their votes are exempt from the judgment of the people; that the Supreme Court, when it has undertaken to act on questions essentially political in character, has not escaped this judgment; that the decisions of this high tribunal in support of slavery have been openly condemned; that the memorable utterance known as the Dred Scott decision was indignantly denounced and repudiated, while the Chief Justice who pronounced it became a mark for censure and rebuke; and that plainly the votes of Senators on an impeachment can not enjoy an immunity from popular judgment which has been denied to the Supreme Court, with Taney as Chief Justice.

2. *Resolved*, That the Senate is not at any time a court invested with judicial power, but that it is always a Senate with specific functions, declared by the Constitution; that according to express words, "the judicial power of the United States is vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish," while it is further provided that "the Senate shall have the sole power to try all impeachments," thus positively making a distinction between the judicial power and the power to try impeachments; that the Senate on an impeachment does not exercise any portion of the judicial power, but another and different power, exclusively delegated to the Senate, having for its sole object removal from office and disqualification therefor; that, by the terms of the Constitution, there may be, after conviction on impeachment, a further trial and punishment "according to law," thus making a discrimination between a proceeding by impeachment and a proceeding "according to law;" that the proceeding by impeachment is not "according to law," and is not attended by legal punishment, but is of an opposite character, and from beginning to end political, being instituted by a political body, an account of political offenses, being conducted before another political body having political power only, and ending in a judgment which is political only; and therefore the vote of a Senator

[20] Senate Journal, pp. 272, 276, etc.
[21] Globe Supplement, pp. 11, 28.
[22] Senate Journal, p. 829; Globe Supplement, p. 12.
[23] Senate Journal, p. 448; Globe, p. 2790.

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on impeachment, though different in form, is not different in responsibility from his vote on any other political question; nor can any Senator on such an occasion claim immunity from that just accountability which the Representative at all times owes to his constituents.

3. *Resolved.* That Senators in all that they do are under the constant obligation of an oath, binding them to the strictest rectitude; that on an impeachment they take a further oath, according to the requirement of the Constitution, which says, "Senators, when sitting to try impeachment, shall be on oath or affirmation;" that this simple requirement was never intended to change the character of the Senate as a political body and can not have any such operation; and therefore, Senators, whether before or after the supplementary oath, are equally responsible to the people for their votes, it being the constitutional right of the people at all times to sit in judgment on their Representatives.

It does not appear that this resolution was ever acted on.

2058. During the Johnson trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.—In the course of the arguments during the impeachment trial of Andrew Johnson, President of the United States, the question as to whether or not the Senate sitting for the trial had the attributes of a court was discussed at length. Mr. Manager Benjamin F. Butler, of Massachusetts, argued [24] that it did not. Of the Senators who filed written opinions, Mr. Charles Sumner of Massachusetts, sustained at length the view that impeachment was a political and not a judicial proceeding.[25]

Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, argued that the Senate was a court,[26] and Mr. Thomas A. R. Nelson, of Tennessee, also of counsel for the President, took the same view, arguing at length,[27] as did Mr. William S. Groesbeck, of Ohio, also of counsel for the President.[28] Mr. William M. Evarts, of counsel for the President, argued from both English and American precedents, that the Senate sat as a court.[29] Of the Senators who filed written opinions in the case, this view was sustained by Mr. Garrett Davis, of Kentucky.[30]

2059. The Senate, by majority vote, assumed jurisdiction to try the Belknap impeachment, although protest was made that a two-thirds vote was required.—On June 6, 1876,[31] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, presented the following:

Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Here in court comes the said William W. Belknap and moves the court now here to vacate the order entered of record in this cause setting aside and holding as naught the plea of him, said Belknap, by him first above in this cause pleaded, for the reason that said order was not passed with the concurrence of two-thirds

[24] Second session Fortieth Congress, Globe Supplement, p. 30.
[25] Pages 463, 464.
[26] Page 134.
[27] Pages 290, 291.
[28] Pages 310, 311.
[29] Pages 340, 341.
[30] Pages 438, 439.
[31] First session Forty-fourth Congress, Senate Journal, p. 948; Record of trial, pp. 162–164.

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of the Senators present and voting upon the question of adopting and passing said order, as appears by the record in this cause.

WILLIAM W. BELKNAP.
J. S. BLACK,
MONTGOMERY BLAIR,
MATT H. CARPENTER,
Of Counsel.

The plea referred to was that the Senate had no jurisdiction to try the case, since Mr. Belknap had resigned before the impeachment was made.

At the previous sitting, on June 1, Mr. Carpenter had said: [32]

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators present and voting. Suppose a case in the Supreme Court, where only a majority of the judges need concur in the judgment; and suppose the record to show that only four judges concurred in the judgment while five dissented, but the minority directed the clerk to enter the judgment or order as the act of the court, and he should do so and certify it as such under the seal of the court. It is manifest, I think, that such judgment, if the dissent of the majority appeared of record, would be absolutely void, and would be so declared by any court where the judgment should come in question collaterally. I think this judgment is in the same category.

* * * * * * *

That we can raise these questions on a final hearing, is clear, because it can not be maintained that any question upon which conviction depends can be eliminated from such final determination by the action of less than the constitutional majority of two-thirds. Otherwise a mere majority of the Senate might defeat the constitutional provision.

In these cases of impeachment, if a mere majority can settle the question of jurisdiction, so a mere majority, by overruling a demurrer to the articles, can determine that the acts alleged to have been done or omitted by the respondent constitute in law a high crime or misdemeanor within the meaning of the Constitution; leaving the final judgment to rest only upon questions of fact or at the final hearing, none of these questions having been disposed of, some master tactician might first move a resolution declaring that the respondent had done or omitted the acts charged, and if sustained by a mere majority, might claim that the facts were settled, and that judgment must rest upon the question of law whether such facts amounted to a high crime or misdemanor.

In briefer and plainer terms, no conviction can take place under this provision of the Constitution, unless two-thirds of the Senators concur in regard to every element necessary to conviction, and first and conspicuous among these, must be the question of jurisdiction.

Mr. Manager Scott Lord had said. [32a]

On the point which the counsel has suggested, practically that a two-thirds vote is necessary on the question of jurisdiction, that Senators who voted that this court had not jurisdiction must therefore on the final vote, when the question is put, "Did this defendant take $1.500 on a given occasion and for such a purpose?" say "Not guilty," because of their views in regard to jurisdiction—on this point I say we shall be prepared to show that there is nothing whatever in the suggestion; in fact, that the whole practice of courts of impeachment has been in contravention of it; that the Constitution itself prevents any such possibility. Therefore when this question is raised in some proper form we shall desire to be heard upon it.

Mr. Allen G. Thurman, a Senator from Ohio, said: [33]

That question can be argued on the motion submitted by the counsel for the respondent. I suppose it can be argued at almost any time or in any way. In my judgment it never can be decided until we come to the final decision, but it can be argued on the motion submitted; although I think it is pretty clear, for rea-

[32] Record of trial, pp. 159, 161.
[32a] Pages 159, 160.
[33] Page 163.

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sons that I am not at liberty to state now, that it can not be decided on any such motion as that submitted by the counsel.

And Mr. Black, of counsel for the respondent, concurred:

I will say now that, so far as I can see, the statement of the law upon this point as made by the Senator from Ohio [Mr. Thurman] is what meets with my view. I have not had time to consult with the other counsel in the case and do not know how they feel about it; but I think, whatever may be done with this motion or whenever it may be argued, it can not really be directly decided until the final determination of the case, and what we ought to have, threfore, the privilege of arguing the point at any time. It is a question that arises and will arise at every step of this case as we go on.

Mr. William Pinkney Whyte, a Senator from Maryland, proposed this order:

Ordered, That the Senate sitting as a court of impeachment adjourn until to-morrow at one o'clock p. m., when argument shall be heard upon the motion offered by the counsel for the respondent.

The order was disagreed to, yeas 18, nays 23.

On June 16 [34] Mr. Black, of counsel for the respondent, presented the following paper:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, the said Belknap, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachmen as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of law; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment were commenced against him by the House of Representatives of the United States, the Senate cannot take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his

[34] Senate Journal, pp. 952, 955, 959; Record of Trial, pp. 169–173.

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resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid, it was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the members present," (meaning on trial on impeachment,) avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid, and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void as an order of said court.

And the said respondent prays the court now here, as he has before formally moved said court, to vacate said order, and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP.
MATT H. CARPENTER,
J. S. BLACK,
MONTGOMERY BLAIR,
Of Counsel for said Respondent.

The Senate thereupon adopted the following order, the first clause being agreed to by a vote of yeas 26, nays 24, and the second by a vote of yeas 21, and nays 16.

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause; and the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

This question was discussed somewhat at length during the final arguments in this case, Messrs, Montgomery Blair,[35] J. S. Black,[36] and Matt. H. Carpenter,[37] sustaining the contention already made by them, and Messrs, Managers William P. Lynde[38] and Scott Lord[39] taking the opposing view.

[35] Record of Trial, p. 287.
[36] Page 316.
[37] Pages 333, 334.
[38] Pages 295, 296.
[39] Pages 335, 336.

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The question had also been discussed briefly on July 6,[40] when the managers began to introduce testimony, Mr. Black having proposed the following:

The counsel for the accused object to the evidence now offered and to all evidence to support the opening of the managers, on the ground that there can be no legal conviction, the Senate having already determined the material and necessary fact that the defendant is not, and was not when impeached, a civil officer of the United States.

The question being submitted:

Shall the objection of counsel for the respondent be sustained?

it was decided in the negative without division.

2060. The Senate, in 1868, when certain States were without representation, declined to question its competency to try an impeachment case.—On February 29, 1868,[41] the Senate was proceeding to the consideration of rules of procedure for impeachments, the occasion being the proposed impeachment of Andrew Johnson, President of the United States, when Mr. Garrett Davis, of Kentucky, moved to recommit the rules with instructions as follows:

That the committee report as a substitute for the rules just read the following:

"That the Constitution of the United States having appointed the Senate to be the court to try all impeachments, and having provided that the Senate shall be composed of two Senators from each State, and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Texas, Louisiana, and Florida having each chosen two Senators, and those Senators not having been admitted to their seats in the Senate, while they continue to be excluded the Senate can not be formed into a constitutional and valid court of impeachment for the trial of articles of impeachment preferred against Andrew Johnson, President of the United States."

Mr. Davis argued elaborately in favor of his motion, saying in the course of his remarks:

The motion that I make is based upon the idea that while the present Members of the Senate exclude ten States from representation in the body the Senators representing the remaining States, which are not excluded, have no right to form a court of impeachment, and can not do so until the ten States whose Senators have been excluded are admitted as Senators. I think myself that the motion is properly made at this time to the Senate, not to the court of impeachment. Whether the Senate will form itself into a court of impeachment or not is a Senatorial question. It is not a question for the court of impeachment to decide. It does not come before the court of impeachment at all, according to my judgment of the matter. The Senate must be in such condition as to numbers and representation from all the States that it has the constitutional power to resolve itself into a court of impeachment. Whether it be in that condition or not is a question not for the court to decide, but for the Senate, before it resolves itself into a court of impeachment to decide. It seems to me that that is the correct position in relation to that point. Being of that opinion, I will proceed at on great length with my remarks.

If the ten excluded States had never been in the rebellion, if they were now represented upon the floor of the Senate, could the Senate or could the two Houses of Congress exclude from representation in both Houses ten other States; and having excluded ten other States, could the remaining Senators from twenty-seven instead of thirty-seven States resolve themselves into a court of impeachment for the trial of the President? I presume that no Senator will answer that question in the affirmative. If that is conceded, to my mind it concedes the whole principle and the whole proposition, and I will proceed to assign one or two reasons why I believe so.

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[40] Senate Journal, p. 961; Record of Trial, pp. 180, 181.

[41] Second session Fortieth Congress, Senate Journal, pp. 236, 237; Globe, pp. 1516–1520.

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Any State that was in rebellion, after the rebellion was suppressed and after the State submitted itself to the Constitution and laws and authorities of the United States, which fact was admitted by her representation in the Senate or in the House, was as much in the Union as though that State had never been in the rebellion. I will take the State of Virginia. The State of Virginia has had a representative in the Senate since the suppression of the rebellion and since the time when there was a single arm raised against the authority of the United States; that Senator has served two sessions here since the rebellion was entirely suppressed; he was recognized by the Senate as a representative of the State of Virginia, and the Senate in taking that course toward him admitted that State to be in the Union as a State with all the rights and privileges which she would be entitled to under the Constitution as if she had never been in the rebellion at all. In the case of Luther *v.* Borden that principle is decided, and I will read a passage from it. The honorable Senator from Indiana [Mr. Morton] and the honorable Senator from Oregon [Mr. Williams] and all the Senators who support the Congressional policy of reconstruction seem to rely upon that case as their principal authority, at least the principal experiment of their authority. I will read one paragraph from that decision:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority."

There is the plain principle. It is in conformity to the principle of the law of post limine, too; it is in conformity to our Constitution. It is a declaration of the principle of the Constitution in these few and simple words, that when Congress has admitted Senators and Representatives from a State both the existence and authority of the government under which they were appointed and its republican form have been recognized by the proper constitutional authority.

Sir, it seems to me that this decision settles the question as to Virginia and as to Tennessee. The Senators, or at least a Senator from Tennessee and Senators from Virginia, and Representatives from both States, have been admitted by Congress to their seats in both Houses. That, this decision says, is a recognition by the proper constitutional authority of the governments under which those Senators and Representatives were appointed and of the republican form of the governments under which they were appointed.

Mr. Oliver P. Morton, of Indiana, replied, saying, in the course of his remarks:

The Constitution requires no other Senate for the trial of an impeachment than what is required for any other purpose. The same Senate that can pass a bill can sit in the trial of an impeachment. The Senator can find no difference in the Constitution. There is nothing in the Constitution that says there shall be two Senators here from every State; it says that to convict on impeachment shall require the votes of two-thirds of the Members present—that is what it says.

But, Mr. President, the Senator from Kentucky ignores one fact in his argument, which I think is of some importance in the consideration of this question; that is to say, he ignores the fact that there has been a rebellion. He treats the ten States which now have no representatives on this floor as being illegally and improperly excluded without cause. He omits any recognition of the fact that there has been a rebellion, that the people of those States have been in arms against the Government of the United States. He omits to mention the fact that they withdrew their Senators from this Chamber for a treasonable purpose, and that they engaged in hostility against the Government of the United States. These facts are material in the consideration of this question.

He says that every State in this Union is entitled to two Senators upon this floor. I controvert that proposition entirely. If the people of a State have destroyed their State government, if they have no legal State government that is authorized to elect Senators, I ask how they can have Senators upon this floor? If we regard these ten States as States in this Union, still the fact remains that they destroyed their loyal State governments, and they have no State governments that are legal and are recognized by the Government of the United States, and therefore they have no means under the Constitution of putting Senators upon this floor.

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But, Mr. President, I do not think it worth while to undertake to follow the Senator in his argument. As I remarked before, I regard his presence here as a protest against his whole argument.

Mr. James A. Bayard, of Delaware, opposed the motion of Mr. Davis, but solely on the ground that the subject was not one for the decision of the Senate, but was for the court of impeachment to decide.

The motion to recommit was decided in the negative, yeas 2, nays 39.

On March 23, 1868,[42] after the Senate had organized for the trial of the President, after the articles of impeachment had been presented but before the reply had been made, Mr. Davis presented the following:

Mr. Davis, a Member of the Senate and of the Court of Impeachment, from the State of Kentucky, moves the court to make this order:

The Constitution having vested the Senate with the sole power to try the articles of impeachment of the President of the United States preferred by the House of Representatives, and having also declared that "the Senate of the United States shall be composed of two Senators from each State chosen by the legislatures thereof," and the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Arkansas, Louisiana, and Texas having, each by its legislature, chosen two Senators who have been and continue to be excluded by the Senate from their seats, respectively, without any judgment by the Senate against them personally and individually on the points of their elections, returns, and qualifications, it is

***Ordered*, That a court of impeachment for the trial of the President can not be legally and constitutionally formed while the Senators from the States aforesaid are thus excluded from the Senate; and this case is continued until the Senators from these States are permitted to take their seats in the Senate, subject to all constitutional exceptions to their elections, returns, and qualifications severally.**

The question on agreeing to the order was taken without debate, and there appeared, yeas 2, nays 29. So the order was not agreed to.

2061. The doctrine of disqualifying personal interest as applied to a Senator sitting in an impeachment trial.

In 1868 the President pro tempore of the Senate voted on the final question at the Johnson trial, although a conviction would have made him the successor.

A Senator related to President Johnson by family ties voted on the final question of the impeachment without challenge.

A question as to the time when the competency of a Senator to sit in an impeachment trial should be challenged for disqualifying personal interest.

On March 5, 1868,[43] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, and after the Chief Justice had taken the chair, the administration of the oath to Senators proceeded until the name of Mr. Benjamin F. Wade, of Ohio, was called. As Mr. Wade arose from his seat and advanced to take the oath Mr. Thomas A. Hendricks, of Indiana, a Senator, entered an objection:

The Senator just called is the Presiding Officer of this body, and under the Constitution and laws will become the President of the United States should the proceeding of impeachment, now to be tried, be sustained. The Constitution providing that in such a case the possible successor cannot even preside in the body during the trial, I submit for the consideration of the Presiding Officer and of the Senate the question whether, being a Senator, representing a State, it is

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[42] Senate Journal, pp. 828, 1829; Globe Supplement, p. 12.

[43] Second session Fortieth Congress, Senate Journal, p. 809; Globe, pp. 1671–1680, 1699, 1700.

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competent for him, notwithstanding that, to take the oath and become thereby a part of the court? I submit that upon two grounds, first, the ground that the Constitution does not allow him to preside during these deliberations because of his possible succession, and, second, the parliamentary or legal ground that he is interested, in view of his possible connection with the office, in the result of the proceedings, he is not competent to sit as a member of the court.

An extended debate at once arose. Mr. John Sherman, of Ohio, urged that this tribunal was not to be tested by the ordinary rules of civil law. The State of Ohio had a right to send two Senators, and the Constitution gave them each a vote. Mr. Jacob M. Howard, of Michigan, made the point that Mr. Wade might not necessarily be President pro tempore at the end of the trial, and hence was not necessarily personally interested. Messrs. Lot M. Morrill, of Maine, and George H. Williams, of Oregon, urged that the question was premature, since the party interested to make the objection was not present, and no Senator should make it, and that the Senate should be organized before the question should be raised.

In the course of the debate Mr. Oliver P. Morton, of Indiana, said:

Mr. President, if it should now be determined that the Senator from Ohio shall not be sworn it would be an error, a blunder of which the accused would have just right to complain when he should come here. If a judge is interested in a case before him, or if a juror is interested in the result of the issue which he is called upon to try, it is an objection that the parties to the case have the right to waive; and they have always had that right under any system of practice that I have known anything about.

As was suggested by the Senator from Maine [Mr. Morrill] and the Senator from Oregon [Mr. Williams], it is not an objection to be made by a fellow juror, by another member of the court, or by anybody except the parties to thet case; and if we now, in the absence of the accused, say that the Senator from Ohio shall not be sworn, the President when he comes here to stand his trial will have a right to say "A Senator has been excluded that I would willingly accept; I have confidence in his integrity; I have confidence in his character and in his judgment, and I am willing to waive the question of interest; who had the right to make it in my absence?" The Senator from Indiana, my colleague, and the Senator from Kentucky have no right to make the question unless they should do it in the character of counsel for the accused, a character they do not maintain.

Mr. President, I desire to say one thing further, that this objection made here, in my judgment, proceeds upon a wrong theory. It is that we are now about putting off the character of the Senate of the United States and taking upon ourselves a new character; that we are about ceasing to be a Senate to become a court. Sir, I reject that idea entirely. This is the Senate when sworn, this will be the Senate when sitting upon the trial, and can have no other character. The idea that we are to become a court, invested with a new character, and possibly having new constituents, I reject as being in violation of the Constitution itself. What does that say? It says that "the Senate shall have the sole power to try all impeachments." The Senate shall have the sole power to try; it is the Senate that is to try; not a high court of impeachment—a phrase that is sometimes used—that is to be organized, to be created by the process through which we are now going; but, sir, it is simply the Senate of the United States. The Senate "when sitting for that purpose shall be on oath or affirmation." That does not change our character. We do not on account of this oath or affirmation cease to be a Senate, undergo a transformation, and become a high court of impeachment; but the Constitution simply provides that the Senate, while as a Senate, trying this case shall be under oath or affirmation. It is an exceptional obligation. The duty of trying an impeachment is an exceptional duty, just as is the ratification of a treaty; but it is still simply the Senate performing that duty. "When the President of the United States is tried the Chief Justice shall preside." Preside where? In some high court of impeachment, to be created by the transformation of an oath? No, sir. He is to preside in the Senate of the United States, and over the Senate; and that is all there is of it. "And no person shall be convicted without the concurrence of two-thirds of the Members present." Two-thirds of the Members of the Senate.

Mr. President, if I am right in this view, it settles the whole question. The Senator from Ohio is a Member of the Senate. My colleague has argued this

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question as if we were about now to organize a new body, a court, and that the Senator from Ohio is not competent to become a member of that court. That is his theory. The theory is false. This impeachment is to be tried by the Senate, and he is already a Member of the Senate, and he has a constitutional right to sit here, and we have no power to take it from him. As to how far he shall participate, as to what part he shall take in our proceedings, as has been correctly said, that is a question for him to decide in his own mind. But, sir, he is already a Member of this body; he is here; he has his rights already conferred upon him as a Member of this body, and he has a constitutional right to take part in the performance of this business, as of any other business, whether the ratification of a treaty or the confirmation of an appointment or the passage of a bill, which may be devolved on this body by the Constitution of the United States. Because he has been elected President pro tempore of the Senate does that take from him any of his rights as a Senator? Those rights existed before, and he can not be robbed of them by any act of this Senate.

But, sir, aside from this question, which goes to the main argument, this entire action is premature. There is nobody here to make this challenge, even if it could be made legitimately. The Senators making it do not represent anybody but themselves. The accused might not want it made. He might, perhaps, prefer the Senator from Ohio to any other Member of this body to try his case. It is always the right of the defendant in a criminal proceeding and of the parties in a civil action to waive the interest that a juror or a member of the court may have in the case.

Mr. Reverdy Johnson, of Maryland, said:

While I am up, permit me to say a few words in reply to the honorable Member from Indiana [Mr. Morton]. He tells us it is for the President of the United States—applying his remarks to the case which is to be and is before us—himself to make the objection, and that he may waive it. With all due deference to the honorable Member, that is an entire misapprehension of the question. The question involved in the inquiry is, what is the court to try the President? It is not to be such a tribunal as he chooses to try him. It is a question in which the people of the United States are interested, in which the country is interested; and by no conduct of the President, by no waiver of his, can he constitute this court in any other way than the way which the Constitution contemplates; that is to say, a court having all the qualities which the Constitution intends.

The honorable Member tells us that we are still a Senate and not a court, and that we can not be anything but a Senate and can not at any time become a court. Why, sir the honorable Member is not treading in the footsteps of his fathers. The Constitution was adopted in 1789, There have been four or five cases of impeachment, and in every case the Senate has decided to resolve itself into a court, and the proceedings have been conducted before it as a court and not as a Senate. To be sure, these component elements of which the court is composed are Senators, but that is a mere descriptio personarum. They are members of the court because they are Senators, but not the less members of a court. The Constitution contemplated their assuming both capacities. As a Senate of the United States they have no judicial authority whatever; their powers are altogether legislative; they are to constitute and do constitute only a portion of the legislative department of the Government; but the Constitution for wise purposes says that in the contingency of an impeachment of a President of the United States or any other officer falling within the clause authorizing an impeachment they are to become, as I understand, a court. So have all our predecessors ruled in every case; and who were they? In the celebrated case of the impeachment against Mr. Chase, who was one of the associate justices of the Supreme Court of the United States, there were men in the Senate at that time whose superiors have not been found since, nor at any time before, and they adopted the idea and acted upon the idea that the Senate in the trial of that impeachment acted as a court and not as a Senate.

I submit, therefore, that the honorable Member from Indiana [Mr. Morton] is altogether mistaken in supposing that we are not a court. But look at the power which we are to have. We are to pronounce judgment of guilty or not guilty: we are to answer upon our oaths whether the party impeached is guilty or not guilty of the articles of impeachment laid to his charge, and having pronounced him guilty or not guilty, we are then to award judgment. Who ever heard of the Senate of the United States in its legislative capacity awarding a judgment.

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But besides that, why is it, Mr. Chief Justice, that you are called to preside over the court, or the Senate when acting as a court to try an impeachment? It is because it is a court. You have no legislative capacity; your functions are to construe the laws in cases coming before you; and the very fact that upon the trial of an impeachment of the President of the United States the Vice-President is to be laid aside, and the ordinary Presiding Officer, if the Vice-President himself does not exist, and you are to preside, shows that it is a court of the highest character, demanding the wisdom and the learning of the Chief Justice of the United States.

The honorable Member says, and other Members have said, that a question of interest or no interest is not involved in an inquiry of this description. Does the honorable Member mean to say that if the honorable Member from Ohio had a bill before the Senate awarding to him a sum of money upon the ground that it was due to him by the United States he could vote upon the question of the passage of the bill? Why not if the honorable Member from Indiana is right? He is a Senator. If he is right that the Constitution intends that each State shall have two votes upon every question coming before the body, then in the case supposed the honorable Member from Ohio would have a right to vote himself, and by his own vote to place money in his own possession. Who ever heard that that was a right that could be accorded anywhere?

Mr. President, courts have gone so far as to say that a judgment pronounced by a judge in a court of which he was the constitutional officer in a case in which he had a direct interest, was absolutely void upon general principles; and void because of any statutory regulation on this subject, but void upon the general ground that no man shall be a judge in his own case. Does it make any difference what may be the character of the interest? If the honorable Member from Ohio was the sole party under the Constitution to try this impeachment, could he try it? Would not everybody say it is a casus omissus? There can be no trial as long as he continues to be the sole Member of the court, because he has a direct and immediate interest in the result; because the judgment would be absolutely void as against the general principle founded in the nature of man, that no man should be permitted to adjudge a question in which he has a direct interest.

Mr. John Sherman, of Ohio, said:

Mr. President, I certainly do not appear here to represent my colleague on this question, but I represent the State of Ohio, which is entitled to two Senators on this floor. The Constitution declares that each Senator shall have a vote, and the Constitution further declares that each Senator shall take an oath in cases of impeachment. The right of my colleague to take the oath, his duty to take it, is as clear in my mind as any question that ever was presented to me as a Senator of the United States. The Constitution makes it plainly his duty to take the oath. He is a Senator, bound to take the oath, according to my reading of the Constitution; and every precedent that has been cited, and every precedent that has been referred to, bears out this construction. If after he has taken the oath as a Member of the Senate of the United States, for the purposes of this trial, anybody objects to his right to vote on any question that may be presented to this court or to the Senate hereafter, the objection can then be made and discussed; but his right in the preliminary stages to take the oath, and his duty to take it, is made plain by the Constitution itself. If hereafter, when the impeachment progresses, his right to vote on any question is challenged the question may be discussed and decided.

The case cited by my honorable friend from Maryland is directly in point. Mr. Stockton came here with a certificate from the State of New Jersey in due form; he presented it, and was sworn into office. Did anybody object to his being sworn? At the same time other papers were presented to the Senate challenging his right to be sworn, saying that the legislature of New Jersey had never elected Mr. Stockton; but because of that did anybody object to the oath being administered to Mr. Stockton? No one; although his right to take the oath was challenged, and a protest signed by a very large number of the members of the New Jersey legislature against his right to the seat, was presented. He was sworn in and took his seat here by our side, and voted and exercised the rights of a Senator. When the question of the legality of his own election came up, the Senate decided that he was not legally elected, and the question referred to arose upon his right to vote in that particular case. The question was whether he could vote, being interested in the subject-matter. The Senator from Massachusetts made the objection, and offered a resolution that he had not a right to vote in the particular case; and after debate that was decided in the affirmative, although by a very

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close vote. My own conviction then was and is yet that Mr. Stockton, as a Senator from the State of New Jersey, had a right to vote in his own case, although it might not be a proper exercise of the right.

So, sir, this question has been decided two or three times in the House of Representatives. In the celebrated New Jersey case, where a certificate of election was presented by certain Members from the State of New Jersey and they were excluded, public history has pronounced their exclusion to have been an unjustifiable wrong upon the great seal of the State of New Jersey. I believe that action is now generally admitted and conceded to have been wrong. Those men presented their credentials in the regular form, and they had the right to be sworn. So in many other cases where the right of persons to hold office is in dispute, those who have the prima facie right are sworn into office, and then the right is examined and finally settled. I had a matter presented to me once in which I was personally interested, and where I was sworn into office. I was directly and personally interested; but I took the oath of office, and I discharged my duties as a Member of the House of Representatives; and when the question came up whether I should vote on the election of a particular officer, I being a candidate for the office, I refused to vote. But it was my refusal which prevented my vote from being received. If I had chosen to vote, I had the right as a Member from the State of Ohio, even for myself. I have no doubt whatever of that. It is the right of the State; it is the right of the people; it is the right of representation. The power of the State and the power of the people must be exercised through their Senators and trough their Representatives.

In the particular case here I do not suppose, I do not know at least, whether the question will ever arise. My colleague is required to take this oath as a Member of the Senate of the United States. You have no right to assume, nor have Senators the right to assume, that he will vote on questions which may affect his interest. That is a matter for him to decide; but the right of the State to be represented here on this trial of an impeachment is clear enough. Whether he will exercise the right, or whether he will waive it, is for him to determine. You have no right to assume that he will exercise the right or power to vote for himself where he is directly interested in the result.

It seems to me, therefore, that no Senator here has a right to challenge the voice of the State of Ohio, and the right of the State of Ohio to have two votes here is unquestionable unless when the question is raised in due form it shall be decided against my colleague. In the preliminary stages, when we are organizing this court, he ought to be sworn, and then if he is to be excluded by interest, unfitness, or any other reason, the question may be determined when raised hereafter; but no Senator has the right now to challenge his authority to appear here and be sworn as a Senator of the State of Ohio. His exclusion must come either by his own voluntary act, proceeding on what he deems to be just and right according to general principles, or it must be by the act of the Senate upon an objection made by the person accused in the trial of the impeachment. It seems to me that is clear and therefore I object to any waiver of the matter. I think my colleague has a right to present himself and be sworn precisely as I and other Senators have been sworn. Then let him decide for himself whether, in a case in which his interest is so deeply affected, he will vote on any question involved in the impeachment. If he decides to vote, when his vote is presented, then, not the Senator from Indiana, but the accused may make the objection, and we shall decide the question as a Senate or as a court, for I consider the terms convertible; we shall then decide the question of his right to vote.

Sir, several things have been introduced into this debate that I think ought not to have been introduced. The precise character of this tribunal, whether it is a court or a Senate, has nothing to do at present with this question. The only question before us is whether Benjamin F. Wade, acknowledged to be a Senator from the State of Ohio, has a right to present himself and take the oath prescribed by the Constitution and the laws in cases of impeachment. He is not the Vice-President; he is not excluded by the terms of the Constitution. He is the presiding officer of the Senate, holding that office at our will. You have no right to take away from him the power to take the oath of office and that to decide for himself as to whether, under all the circumstances, he ought to participate in this trial.

Mr. James A. Bayard, of Delaware, said:

Mr. President, I incline to the opinion that the objection made by the honorable Senator from Maine [Mr. Morrill] to the motion of the honorable Senator from Indiana [Mr. Hendricks], and also that made by the honorable Senator from

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Oregon [Mr. Williams], is correct. I can not see how a Senator is to object to another Senator being sworn in, although I think there may be some doubt raised on the question for this reason: The Constitution provides that in a case where the President of the United States is tried under an impeachment the Chief Justice of the United States, not the Vice-President, shall preside; and though that was intended originally to look to the Vice-President alone, yet if another person, from the death of the Vice-President, or from his absence or his acting as President, stands in precisely the same relation to the office of President under the law and the Constitution, whether he be a Senator or not, ought not the principle equally to apply?

It certainly excludes the Vice-President from being a member of the court. Does it not equally exclude the presiding officer of the Senate? It does not make him, being a Senator, less a Senator of the United States in his legislative capacity; but the clause of the Constitution prevents and is intended to prevent the influence of the man who would profit as the necessary result of the judgment of guilty in the case. It supposes that he can not be or may not be sufficiently impartial to sit as a judge in that case or to preside in the court trying it. That is the object, as I suppose.

But, sir, there is great force in the objection that that point must come by plea or motion, if you please, from the party accused; and I should not have thought for a moment of embarking in this discussion had it not been for the renewal by the honorable Senator from Indiana [Mr. Morton] of the endeavor to disprove the idea that the Senate must be organized into a court for the purpose of a judicial trial. Now, sir, whether it is to be a high court of impeachment or a court of impeachment, or to be called by the technical name court, is, in my judgment, immaterial; but the honorable Senator's argument did not touch the Constitution. The Senate is to constitute the court; the Senate is to try. Is there nothing in the provisions of that article which gives the judicial authority—for it is not legislative, it is judicial authority conferred, a judicial authority in special cases—is there nothing in that article which, of necessity, makes the body a judicial tribunal whenever it assumes these functions, and not a legislative body? Otherwise, how comes the presiding officer who now fills the chair to be in the seat which he occupies? When the Constitution says that the Senate shall have the sole authority to try impeachments is it necessary that it should say that the Senate shall be a court for the purpose of trying impeachments if every clause of the Constitution shows that it must be a judicial tribunal and must be a court, or else the language is meaningless which is applied to its organization? The members of the body are to be sworn specially in the particular case as between the accused and the impeachers. Is not that the action of a court? They are to try an individual in a criminal prosecution. Is not that judicial action? Is not the entire judicial power of the United States vested in the Supreme Court and the inferior courts, with that exception, by the very terms of the Constitution?

But, further, the body is to give judgment, to pronounce judgment, a judgment of removal from office always as the result of conviction; and if they please to carry it still further, they may pronounce judgment of disqualification from hereafter holding any office. Do not these terms of necessity constitute a court?

Mr. Charles Sumner, of Massachusetts, dissented from the view that the Chief Justice was made the presiding officer because the Vice-President would be an interested party, and argued from the literature contemporaneous with the Constitution that the Vice-President was expected to perform the duties of the President while the trial was going on. As to the question of personal interest, Mr. Sumner said:

There were other remarks made by Senators over the way to which I might reply. There was one that fell from my learned friend, the Senator from Maryland, in which he alluded to myself. He represented me as having cited many authorities from the House of Lords tending to show in the case of Mr. Stockton that this person at the time was not entitled to vote on the question of his seat. The Senator does not remember that debate, I think, as well as I do. The point which I tried to present to the Senate, and which, I believe, was affirmed by a vote of the body, was simply this: That a man can not sit as a judge in his own case. That was all, at least so far as I recollect, and I submitted that Mr. Stockton at that time was a judge undertaking to sit in his own case. Pray, sir, what is the pertinency of this citation? Is it applicable at all to the Senator from Ohio?

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Is his case under consideration? Is he impeached at the bar of the Senate? Is he in any way called in question? Is he to answer for himself? Not at all. How, then, does the principle of law, that no man shall sit as a judge in his own case, apply to him? How does the action of the Senate in the case of Mr. Stockton apply to him? Not at all. The two cases are as wide as the poles assunder. One has nothing to do with the other.

Something has been said of the "interest of the Senator from Ohio on the present occasion. "Interest." This is the word used. We are reminded that in a certain event the Senator may become President, and that on this account he is under peculiar temptations which may swerve him from justice. The Senator from Maryland went so far as to remind us of the large salary to which he might succeed, not less than $25,000 a year, and thus added a pecuniary temptation to the other disturbing forces. Is not all this very technical? Does it not forget the character of this great proceeding Sir, we are a Senate and, not a court of nisi prius. This is not a case of assault and battery, but a trial involving the destinies of this Republic. I doubt if the question of "interest" is properly raised. I speak with all respect for others; but I submit that it is inapplicable. It does not belong here. Every Senator has his vote to be given on his conscience. If there be any "interest" to sway him, it must be that of justice and the safety of the country.

On March 6,[44] Mr. Hendricks, after discussing the various questions raised, withdrew his objection, saying:

But, Mr. President, I find that some Senators, among them the Senator from Delaware [Mr. Bayard,] who agree with me upon this question on the merits, are of the opinion that the question ought more properly to be raised when the court shall be fully organized, when the party accused is here to answer. I do not believe that he can waive a question that goes to the organization of the body; I believe it is a question for the body itself. But upon that I find some difference of opinion; and when I find that difference of opinion among those who agree with me upon the merits, upon the main point, whether he shall participate in the proceedings and judgment who may be benefited by it—while I find some Senators, who agree with me upon that question, disagreeing with me upon the question whether it ought to be raised now or when the Senator from Ohio proposes to cast a material vote in the proceedings, I choose to yield my judgment—my judgment, not at all upon the merits; my jdugment not at all upon the propriety and the duty of the Senate to decide upon its own organization; but I yield as to the time when the question shall be made in deference to the opinion of others; and for myself, sir, I withdraw the question which I presented for the consideration of the President of this body and of the Senate yesterday.

The oath was then administered to Mr. Wade.

It appears from the Journal of the proceedings of the trial that Mr. Wade did not vote on any record vote until at the close of the trial, on May 16,[45] when his name is recorded on a question relative to the order of passing judgment on the several articles of impeachment. Thereafter he voted both on incidental questions and on the question of guilty or not guilty.

It appeared from the debate on the qeustion as to Mr. Wade that another Senator was related to Prseident Johnson [46] but no objection was made to him on the ground of affinity, nor did any Senator urge that this should be considered an objection.[47] This Senator was Mr. David T. Patterson, of Tennessee, and he was son-in-law of the respondent. Mr. Patterson participated in the trial throughout, and on May 16 [48] voted "not guilty" on the main question.

2062. Reference to a discussion as to the right to challenge the competency of a Senator to sit in an impeachment trial.—The

[44] Senate Journal, p. 811; Globe, p. 1700.
[45] Senate Journal, p. 942.
[46] Mr. David T. Patterson, a Senator from Tennessee, was son-in-law of the respondent.
[47] Speech of Mr. Howard. Globe, p. 1671.
[48] Globe, p. 411.

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right to challenge a Member of the Senate sitting for the trial of an impeachment case was discussed[49] at length by Mr. Manager Benjamin F. Butler during the impeachment of President Andrew Johnson.

2063. A quorum of the Senate sitting for an impeachment trial is a quorum of the Senate itself and not merely a quorum of the Senators sworn for the trial.—On February 23, 1905,[50] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. William B. Allison, of Iowa, asked for a call of the Senate and there appeared forty-two Senators, and, the Presiding Officer,[51] said:

Upon the call of the Senate, forty-two Senators have answered to their names. A quorum of the Senate sitting in the impeachment trial is not present.

Then, on motion of Mr. Knute Nelson, of Minnesota, the Sergeant-at-Arms was directed to send for absentees.

Later the Presiding Officer said:

A quorum of Senators who have been sworn in the impeachment trial is present—forty-three Senators.

The proceedings under the call were then dispensed with, and the Presiding Officer put the pending question on the admissibility of certain testimony.

There appeared yeas 10, nays 34—a total of 44 Senators responding, and the Presiding Officer announced that the evidence was not admitted.

Mr. Henry M. Teller, a Senator from Colorado, raised a question as to whether or not forty-four Senators constituted a quorum.

The Presiding Officer said:

Forty-three Senators make a quorum of the Senators who have been sworn in the impeachment trial.

Later Mr. Teller again raised the question:

Mr. President, I have been under the impression for a good many years that a majority of this body—in this instance forty-six Senators—made a quorum. I was somewhat surprised to find that a majority of the Senators sworn are held to be a quorum. I am not aware myself of any provision of the Constitution that allows this body to do business with less than a majority. You could not pass here a ten-dollar pension bill without a majority. Is it possible that less than a quorum can exercise the most important function that has been placed on the Senate by the Constitution? In my judgment, there is no court here present tonight. I raise that question.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order is well taken. He will state in this connection, however, that it has not been observed in proceedings of the Senate hitherto.

Thereupon further proceedings were taken to secure a quorum, and the Presiding Officer announced:

On the call of the Senate forty-six Senators have answered to their names. A quorum is present.

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

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[49] Second session Fortieth Congress, Globe Supplement, pp. 30, 31.
[50] Third session Fifty-eighth Congress, Record, pp. 3175, 3176.
[51] Orville H. Platt, of Connecticut, Presiding Officer.

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A little later the Presiding Officer said:

A short time ago the Presiding Officer stated that he thought in this trial there had been a call of the Senate and that business had been conducted when there was less than a quorum of the Senate. He finds upon examination that he was mistaken, and that on the two occasions when the roll call was had to determine the existence of a quorum there was on each occasion a quorum of the Senate present.

2064. An attempt of the House to investigate alleged corruption in connection with the votes of Senators during the Johnson trial was the subject of discussion and investigation in the Senate.—On May 21, 1868,[52] in the Senate sitting in legislative session, but at the time when the impeachment trial of Andrew Johnson, President of the United States, was pending, Mr. John B. Henderson, a Senator from Missouri, rising to a question of privilege, said:

On Saturday last after a vote had been taken in the court of impeachment on the eleventh article, and the Members of the House had retired to their own Chamber, one of the managers offered and the House adopted the following resolution:

"Whereas information has come to the managers which seems to them to furnish probable cause to believe that improper or corrupt means have been used to influence the determination of the Senate upon the articles of impeachment exhibited to the Senate by the House of Representatives against the President of the United States: Therefore,

"*Be it resolved*, That for the further and more efficient prosecution of the impeachment of the President the managers be directed and instructed to summon and examine witnesses under oath, to send for persons and papers, to employ a stenographer, and to appoint subcommittees to take testimony, the expenses thereof to be paid from the contingent fund of the House."

It was advocated by its mover, one of the managers, on the ground that base and corrupt motives had determined the judgment of the Senate; and another one of the managers being asked during a debate on Monday last in the House if he would have Senators perjure themselves, replied that "perjury would not hurt them much."

On Tuesday, the 19th instant, I received the following notice from the managers:

FORTIETH CONGRESS, UNITED STATES,
"HOUSE OF REPRESENTATIVES.
"*Washington, D.C., May 19, 1868.*

"Sir: A question has arisen in the course of our investigation wherein your testimony will tend to instruct the House of Representatives and aid its inquiry.

"Will you do the committee of managers the courtesy to attend at the earliest possible moment at the Judiciary Committee room of the House, where they are in waiting to receive you?

"By direction of the managers.

"Your obedient servant,

"B. D. WHITNEY, *Clerk.*

"Hon. J. B. HENDERSON."

To which I replied as follows—the reply not being delivered, however, till the next morning:

"WASHINGTON CITY, *May, 1868.*

"GENTLEMEN: Yours of this date is received. You say 'a question has arisen in the course of our investigations wherein your (my) testimony will tend to instruct the House of Representatives and aid its inquiry,' and thereupon you request my early attendance before the managers as a witness.

"This request, I take it, is intended to answer the purposes of a subpoena, and is issued under authority of a resolution adopted by the House on Saturday last in the following words, to wit:

"I have already read the resolution.

"A prosecution by impeachment against the President is set on foot, and now, when the evidence and arguments have been fully submitted and the Senate

[52] Second session Fortieth Congress, Senate Journal, p. 416; Globe, pp. 2548–2558.

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as a court is deliberating on its judgment, a second prosecution is instituted against the Senate itself. Whatever may be the purpose of this inquisition—and I use the word in no offensive sense—it is, in my judgment, not only a direct insult to the body of which I am a member, but a proceeding of most dangerous tendency in the future. A large part of our proceedings has been conducted in secret, the managers, counsel, and reporters being excluded. If a member of the court can now, before the rendition of judgment, be withdrawn from consultation and subjected to the inquisition of the prosecutors, that inquisition may reach to all proceedings, and thus subvert the dignity and independence of the Senate. If it be to purge corruption from the Senate, the Senate is the proper body to guard and protect its own honor.

"Personally, I have no objection to appearing and testifying before you to all matters within my knowledge on the subject of impeachment. And were I to refuse, I know a new shower of calumny, base and grievous enough already, would certainly be poured upon me. But in my judgment this proceeding rises above personal considerations. It concerns public justice and effects the character, honor, and dignity of the Senate.

"I am engaged to appear before another committee of your body to-day, and on the meeting of the Senate to-morrow I shall submit this question for its consideration and be governed accordingly.

"Yours, respectfully,

"J. B. HENDERSON.

"To the managers of impeachment on the part of the House of Representatives."

Mr. Henderson urged that the resolution under which the summons had issued contained a direct insult to the Senate, and that the summons was an invasion of the privileges of the Senate.

Mr. Henderson also presented another letter received later from the managers:

WASHINGTON, D.C., *May 20, 1868.*

SIR: The managers have the honor to acknowledge your communication of 19th instant in answer to their request, which was not intended to serve the purpose of a subpœna, but as a courteous intimation to you that you could aid them in the investigation with which they have been charged.

If it had occurred to them to speculate upon the topic, they would have supposed you might do them the justice to believe that they would have asked no question indecorous or improper, certainly not as to anything which occurred in the secret sessions of the Senate. They were not aware of the time they sent their note to you that the Senate was not in session for "deliberation on the judgment" or otherwise, and they also believed that if they so far transgressed the limits of propriety as to make any inquiry which you deemed improper you would certainly have the efficient remedy of declining to answer.

Accepting the theory of your note, that you are a judge, they do not perceive on that account any objection to your answering as to matters pertinent in a further prosecution of the respondent on trial before the Senate for other and different offenses, because it is well known among lawyers that in both civil and criminal trials the presiding judge may be, and when occasion requires is, sworn as a witness in the very case then pending.

Jurors, in like manner, are called from their seats and sworn during the trial; and either, during the adjournment of the court, might legally and properly be called before a grand jury to give evidence on which to find an indictment against the prisoner at the bar for other and different offenses.

They bring these considerations to your notice in order that, seeing the theory upon which they have acted, you will acquit them of any discourtesy, either personal to yourself or to the honorable Senate. Without indicating any opinion upon the question whether a Senator is liable to examination as a witness before a committee of the House, they desire to add that they did not intend to assert such claim in their communication to you of 19th instant. They had no purpose other than to avail themselves of your knowledge of facts, if agreeable to you, to give them the benefit, of your knowledge, to aid them in pursuit of justice and right.

By direction of the managers.

Your obedient servant,

B. D. WHITNEY, *Clerk.*

Hon. J. B. HENDERSON.

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In the course of the debate arising over the presentation made by Mr. Henderson, Mr. Timothy O. Howe, of Wisconsin, asked for the consideration of a resolution presented on a previous day by Mr. Garrett Davis, of Kentucky:

Whereas it is represented that some persons have been and are engaged in violating the rights and privileges of the Senate by the use of threats, intimidation, and other unlawful and improper means toward its Members to constrain them in their consideration, action, and judgment in the matter of the article of impeachment against the President of the United States now pending before the Senate as a court of impeachment; therefore be it

Resolved, That a committee of three, to be appointed by the Chair, do proceed to inquire into the facts of such imputed threats, intimidation, and other unlawful means aforesaid, and the names of the persons, if any, using, or that have used, them; and that said committee have power to send for persons and papers, to take evidence, employ a stenographer, and report the facts to the Senate.

To this Mr. Edmund G. Ross, of Kansas, proposed an amendment adding:

And that said committee be authorized to request the managers on the part of the House to furnish said committee a transcript of all the testimony that has been or may be taken by them in the case of the impeachment of the President.

After debate the further consideration of the subject was postponed.

On May 27 [53] the consideration of the resolution was resumed, when Mr. Davis was permitted to withdraw the resolution and submit it in the following modified form:

Resolved, That a committee of five be appointed by the Chair to inquire into and report the facts in relation to any threats, intimidation, or other improper influences that were used or offered to be used, directly or indirectly, to control or influence the consideration or decision of the Senate or any Senator in the manner of the impeachment of the President of the United States lately pending before the Senate as a court of impeachment. Also, to inquire into and report the facts in relation to any overture or offer of an improper character to any person by or in the name of any Senator or other person in connection with said impeachment trial, and the names of any persons connected with said transactions or any of them. Said committee to have power to send for persons and papers, to summon witnesses, to take their evidence, and employ a stenographer, and to report as early as practicable.

Mr. Ross thereupon proposed an amendment in the nature of a substitute:

That a committee be appointed by the President of the Senate, to be composed of five Senators, whose duty it shall be to inquire whether improper or corrupt means have been used, or attempted to be used, to influence the votes of the Members of the Senate in the trial of the impeachment of the President; and that the said committee be authorized and empowered to send for persons and papers, and to do all things that in their judgment may be necessary for the furtherance of the object of the resolution.

The amendment was agreed to, after debate, and then the resolution as amended was agreed to.

2065. Title by which the Chief Justice is addressed while presiding at an impeachment trial.—In the course of the impeachment trial of Andrew Johnson, the Chief Justice, who was the Presiding Officer, was variously addressed as "Mr. President" and "Mr. Chief Justice." Mr. Manager Butler, in opening the case for the House of Representatives, used the former designation, while Mr. Benjamin

[53] Senate Journal, p. 423; Globe, pp. 2598–2599.

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R. Curtis, of counsel for the President, in his opening used the latter title. Mr. Thaddeus Stevens, of Pennsylvania, one of the managers, in his closing argument, addressed the Presiding Officer as "Mr. Chief Justice." This was the title used by Mr. William M. Evarts and other counsel for the President. In general the managers preferred the title "Mr. President," Messrs. Managers Benjamin F. Butler and John A. Bingham using it almost if not quite invariably. The Chief Justice in ruling usually said, "The Chief Justice thinks," etc., but sometimes said, "The Chair thinks." In the Journal and Record of Debates [54] the words "Chief Justice" are invariably used. The Senators used some one and some the other designation in addressing the Chair.

2066. Forms for addressing the Vice-President or President pro tempore while presiding at an impeachment trial.—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [55] of the Senate presided. The managers and counsel for the respondent, in addressing the Senate sitting for the trial, used the form "Mr. President and Senators." [56]

In the impeachment of William Blount, the Vice-President (Thomas Jefferson, of Virginia) presided, and we find this form of address, "Mr. President." [57]

2067. During the Johnson trial Chief Justice Chase gave a casting vote on incidental questions, and the Senate declined to declare his incapacity to vote.—On March 31, 1868,[58] during the impeachment trial of Andrew Johnson, President of the United States, a motion was made that the Senate retire for consultation, and there appeared on the vote, yeas 25, nays 25.

The Chief Justice thereupon said:

> The Chief Justice votes in the affirmative. The Senate will retire for conference.

The Senate having retired, Mr. Charles Sumner, of Massachusetts, offered the following proposition as an amendment to the pending question:

> That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial, and he can pronounce decision only as the organ of the Senate, with its assent.

This was disagreed to, yeas 22, nays 26.

Later Mr. Sumner proposed the following:

> *Resolved*, That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate, and has no authority under the Constitution to vote on any question during the trial.

This was objected to as not relating to the subject for consideration of which the Senate had retired, and was not considered.

On April 1 Mr. Sumner offered the following:

> It appearing from the reading of the Journal of yesterday that on a question where the Senate were equally divided the Chief Justice, presiding on the trial

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[54] Second session Fortieth Congress, Globe Supplement, pp. 65, 123, 166, 168, 320, 337, 379, 410–414.
[55] T. W. Ferry, of Michigan, President pro tempore.
[56] See Record of trial, pp. 272, 287, 295, etc., First session Forty-fourth Congress.
[57] See Annals of Fifth Congress, vol. II, p. 2278.
[58] Second session Fortieth Congress, Senate Journal, p. 868; Globe Supplement, pp. 62, 63.

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of the President, gave a casting vote, it is hereby declared that in the judgment of the Senate such vote was without authority under the Constitution of the United States.

This was rejected without debate, yeas 21, nays 27.

On April 2, 1868,[59] the question was taken as a motion that the Senate sitting for the impeachment trial adjourn, and there appeared yeas 22, nays 22. Thereupon the Chief Justice said "The Chief Justice votes in the affirmative," and so adjournment was voted.

2068. Discussion of the propriety of arbitrary abridgment by the Senate of the time of an impeachment trial.—On February 21, 1905,[60] in the Senate sitting in legislative session, Mr. Eugene Hale, a Senator from Maine, offered this resolution:

Resolved, That all proceedings in the impeachment trial now before the Senate sitting as a court shall be terminated on Saturday, February 25 next, and a final vote shall be taken on the afternoon of that day at 4 o'clock.

Later, on the same day, in the Senate sitting for the impeachment trial, Mr. Hale introduced the same resolution, for action at a future time.

On February 22,[61] in the Senate in legislative session, Mr. Hale withdrew the resolution and submitted the following:

Ordered, That all proceedings before the Senate sitting in the trial of the impeachment against Charles Swayne, judge of the United States in and for the northern district of Florida, shall terminate on Saturday, February 25 next, and, in pursuance of this order, all testimony upon either side shall be closed on Friday, the 24th day of February next, and the Senate shall commence its session sitting for the trial of said impeachment proceedings at 12 o'clock meridian on said Saturday, the 25th day of February next; and, without any other motion or proceeding intervening, the counsel for the defense shall have until 2 o'clock of said day to present the case of the defendant, said time to be apportioned or divided as said counsel may determine; the managers on the part of the House of Representatives shall have, to present the case against said Charles Swayne, the time from 2 o'clock until 4 o'clock of said day, said time to be apportioned or divided as the managers may determine; at 4 o'clock, without further motion or proceeding intervening, the final vote shall be taken upon said impeachment proceedings.

In support of this resolution, Mr. Hale cited the backward condition of the legislative business.

Mr. Augustus O. Bacon, of Georgia, said in reply:

Mr. President, I quite agree with the Senator from Maine that the legislative business before this Senate is of extreme importance, but I do not think that anything is of more importance than that the Senate shall give such direction to any measures which it may deem necessary for expedition of the impeachment trial as will not bring into discredit and disrepute the very high and important function which we are now performing. In trying the impeachment presented by the House we are complying with the requirements of the Constitution, through which alone the purity and integrity of the public service can be guarded and secured.

The suggestion which I desire to make in this connection, in order that a wrong impression may not go abroad, is that everything which looks to expedition of the impeachment trial should, so far as necessary and practicable, be in the nature of additional time given by the Senate to this work in the interval which now remains at our command, and that it should not be directed to the arbitrary abridgment of the necessary presentation of this case by the House of Representatives, performing, as it does, a high constitutional function in bringing

[59] Senate Journal, p. 878; Globe Supplement, p. 92.
[60] Third session Fifty-eighth Congress, Record, p. 2974.
[61] Record, pp. 3020, 3021.

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and presenting to the Senate its case. If we desire that the impeachment trial shall close by Saturday, then the proper course is to give more time to it each day, so that the managers on the part of the House and the counsel for the respondent may have before them full time in which to fully present their respective cases to the Senate. We all know that this session must end at noon on the 4th of March, and that we are limited in time by law; and the objection which I make to the suggestion of the Senator is not to his effort that we may by proper expedition in the disposition of the impeachment matter have sufficient time for the proper discharge of the important duties of another kind which devolve upon us. My objection is to the method proposed. I prefer that instead of that the direction should be given to this matter which will impose upon us, if it need be, additional labor by providing for additional time to be devoted to the trial each day, and that it be not disposed of by the suggestion of an arbitrary abridgment in the opportunity of the House of Representatives to present its case here, and of the time for the proper consideration by ourselves as to how this important matter shall be determined, and what final disposition shall be given to it.

Mr. William M. Stewart, of Nevada, said:

Mr. President, I should like to make one suggestion in regard to this matter. It is suggested that the Constitution restrains the Senate, and that to comply with the provisions of the Constitution no limitation should be put upon time. We have a constitutional right to trial by jury, we have a constitutional right to have cases heard by the courts, and the courts exercise in pursuance of that a reasonable discretion as to the time to be used. The Supreme Court of the United States have rules in regard to the time to be used in cases to be argued there, and in criminal proceedings the courts put a reasonable limit to the time to be allowed for argument. They have to facilitate a trial in order to comply with the Constitution at all.

This brought from Mr. John C. Spooner, of Wisconsin, this question:

Has the Senator ever known a court before which there was a criminal case to fix a limit of time within which limit testimony for the defense should be presented?

The matter went over.

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Procedure of the Senate in Impeachment*

1. Hour of meeting for trial. Sections 2069–2070.
2. Sittings and adjournments. Sections 2071–2078.
3. Administration of the oath. Sections 2079, 2081.[1]
4. Functions and powers of Presiding Officer. Sections 2082–2089.[2]
5. Duties of the Secretary. Section 2090.
6. Arguments on preliminary or interlocutory questions. Sections 2091–2093.
7. Voting and debate. Section 2094.[3]
8. Secret session. Sections 2095–2097.
9. Voting in judgment. Section 2098.[4]
10. Rules, practice, etc. Sections 2099–2115.[5]

2069. Unless otherwise ordered, the Senate, sitting for an impeachment trial, begins its proceedings at 12 m. daily.

The Presiding Officer of the Senate announces the hour for sitting in an impeachment trial and the Presiding Officer on the trial directs proclamation to be made and the trial to proceed.

An adjournment of the Senate sitting for an impeachment trial does not operate as an adjournment of the Senate.

Immediately upon the adjournment of the Senate sitting for an impeachment trial the ordinary business is resumed.

Present form and history of Rule XII of the Senate sitting for impeachment trials.

Rule XII of the "rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m., and when the hour for such thing [sitting?] shall arrive, the Presiding Officer of the Senate shall so announce, and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The

*Hinds' Precedents, vol. 3, p. 405 (1907).

[1] As to administration of the oath, see, also, Blount's trial (sec. 2308 of this volume), Pack's (secs. 2369, 2375), Humphrey's (sec. 2389), Johnson's (sec. 2422), Belknap's (sec. 2450), Swayne's (sec. 2477).

[2] See, also, sections 2065–2067, 2082–2089.

The president pro tempore presides during absence of the Vice-President. Sections 2309, 2337, 2394.

Medium for putting questions to witnesses and motions to the Senate. Section 2176.

Rulings of, as to evidence. Sections 2193, 2195, 2208.

Does not decide as to attachment of witnesses. Section 2152.

Calls counsel to order for improper utterances. Sections 2140, 2169.

Calls respondent to order. Section 2349.

Admonishes managers and counsel not to delay. Section 2151.

[3] A majority vote only is required on incidental questions. Section 2059.

As to the vote of the Chief Justice when presiding. Sections 2057, 2067.

Debate as to admission of evidence. Sections 2196–2202.

[4] Parliamentary law, as to. Section 2027.

Constitution requires two-thirds vote. Section 2055.

Debate on the question. Section 2094.

Where a plea of guilty might be entered. Section 2127.

Process of judgment in various cases: Blount's (sec. 2318), Pickering's (secs. 2339, 2340), Chase's (sec. 2363), Humphrey's (sec. 2396), Johnson's (secs. 2437–2440), Belknap's (sec. 2466), Swayne's (sec. 2485).

[5] The rules continue from Congress to Congress. Section 2372. Adoption of, at various times. Sections 2389, 2314.

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adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

This rule was first drafted by the committee appointed in 1868 [6] to revise the rules preparatory to the trial of President Johnson. In the House, on March 2, the original form was modified by eliminating the words "high court of impeachment" wherever found and substituting the words "the trial." The form adopted in 1868 is identical with the present form, except that the word "thing" appears instead of "sitting." [7]

2070. At 12:30 p.m. of the day appointed for an impeachment trial the Senate suspends ordinary business and the Secretary notifies the House of Representatives that the Senate is ready to proceed.

Present form and history of Rule XI of the Senate sitting for impeachments.

Rule XI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

At 12:30 o'clock afternoon the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ——— ———, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

This is the form reported and agreed to in the revision of 1868.[8] It was formed by uniting portions of rules 11 and 12, which had been framed in 1805 [9] at the time of the trial of Judge Chase.

2071. The hour of meeting of the Senate sitting for an impeachment trial being fixed, a motion to adjourn to a different hour is not in order.—On March 30, 1868,[10] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. John Sherman moved an adjournment.

Mr. Charles Sumner, of Massachusetts, suggested that the adjournment be to 10 o'clock on the morrow.

The Chief Justice [11] said:

The hour of meeting is fixed by the rule, and the motion of the Senator from Massachusetts is not in order.

2072. In the Johnson trial the Chief Justice held that the motion to adjourn took precedence of a motion to fix the day to which the Senate should adjourn.—On April 3, 1868,[12] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. George F. Edmunds, of Vermont, moved that the Senate adjourn.

Mr. William Pitt Fessenden, of Maine, moved that when the court should adjourn, it adjourn to meet on Monday next.

Mr. Edmunds made the point of order that the motion to adjourn took precedence.

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[6] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, pp. 1534, 1602.
[7] Apparently a misprint.
[8] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1534.
[9] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[10] Second session Fortieth Congress, Globe Supplement, p. 53.
[11] Salmon P. Chase, of Ohio, Chief Justice.
[12] Second session Fortieth Congress, Globe Supplement, pp. 110, 111.

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The Chief Justice [11] said:

The Chair is of opinion that the motion to adjourn takes precedence of every other motion if it is not withdrawn.

2073. In the Senate sitting for an impeachment trial no debate is in order pending a question of adjournment.—On Saturday, April 4, 1868,[13] in the Senate, sitting for the impeachment trial of Andrew Johnson, President of the United States, a motion was made that when the Senate, sitting as a court of impeachment, should adjourn, it should be to meet on Thursday, April 9.

Debate having arisen, the Chief Justice [11] said:

The Chief Justice is of opinion that, pending the question of adjournment, no debate is in order from any quarter. It is a question exclusively for the Senate. Senators, you who are in favor of the adjournment of the Senate sitting as a court of impeachment until Thursday next will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 37, nays 10. So the motion was agreed to.

2074. The motion to adjourn to a certain time has been admitted in the Senate sitting for an impeachment trial.—On June 1, 1876,[14] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George G. Wright, a Senator from Iowa, proposed this inquiry:

Mr. President, I wish to inquire whether it would be in order now to move to adjourn to a day certain, or whether the order should be properly that when the Senate sitting as a court of impeachment adjourns, it be to a definite time?

The President pro tempore [15] said:

It would be in order to move to adjourn to a certain time.

2075. The Senate sits for an impeachment trial with open doors, but may deliberate on its decisions in secret.

Present form and history of Rule XIX of the Senate sitting in impeachment trials.

Rule XIX of the "Rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

The first clause of this rule is in the form adopted in 1805,[16] for the trial of Judge Chase. The second clause, setting forth a contingency in which the doors may be closed, was added in the revision of 1868,[17] preparatory to the trial of President Johnson.

On July 31, 1876,[18] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed to amend the rule by striking off the qualifying clause, so that the proceedings should be held in open session. But the Senate by a vote of yeas 23, nays 32, declined to consider the proposition.

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[13] Second session Fortieth Congress, Globe Supplement, p. 121.
[14] First session Forty-fourth Congress, Record of trial, p. 161.
[15] T. W. Ferry, of Michigan, President pro tempore.
[16] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[17] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 814; Globe, p. 1568.
[18] First session Forty-fourth Congress, Record of trial, p. 341.

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2076. If the Senate fail to sit in an impeachment trial on the day or hour fixed, it may fix a time for resuming the trial.

Present form and history of Rule XXV of the Senate sitting for impeachment trials.

Rule XXV of the "rules of procedure and practice for the Senate when sitting in impeachment trials," is as follows:

If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

This rule was adopted in 1868,[19] preparatory to the proceedings for the trial of President Johnson.

2077. An order for postponement of an impeachment trial was held in order after the organization of the Senate for the trial.—On March 23, 1868,[20] in the Senate as organized for the trial of President Johnson, the Chief Justice of the United States presiding, Mr. Garrett Davis, a member of the Senate from Kentucky, proposed a preamble and order, reciting that the seats of Senators from several States were vacant, and declaring that the trial should be postponed until the Senators from those States should be permitted to take their seats.

Mr. Timothy O. Howe, of Wisconsin, a Senator, objected that the proposition was not in order.

The Chief Justice [21] said:

The motion comes before the Senate in the shape of an order submitted by a Member of the Senate and of the court of impeachment. The twenty-third rule requires that "all the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of rule seven." The seventh rule requires the Presiding Officer of the Senate to "submit to the Senate, without a division, all questions of evidence and incidental questions; but the same shall on the demand of one-fifth of the Members present, be decided by yeas and nays." By amendment this rule has been applied to orders and decisions proposed by a Member of the Senate under the twenty-third rule. The Chair rules therefore that the motion of the Senator from Kentucky is in order.

Thereupon the proposition was entertained.

2078. When informed that managers are to present articles of impeachment, the Senate, by rule, requires its Secretary to inform the House of its readiness to receive the managers.

Present form and history of Senate Rule I as to impeachments.

Rule I, of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," [22] is as follows:

Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

This rule, with two immaterial verbal changes, is in the form adopted for the trial of Judge Chase in 1804.[23] It merely put in form

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[19] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 252; Globe, p. 1503.
[20] Second session Fortieth Congress, Globe supplement, p. 12.
[21] Salmon P. Chase, of Ohio, Chief Justice.
[22] See Senate Manual, p. 171.
[23] Senate Journal, pages 509, 510, second session Eighth Congress.

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of a permanent rule the practice followed in the trials of Senator Blount and Judge Pickering. In 1868,[24] for the trial of Andrew Johnson, President of the United States, the rule received slight verbal changes, and was adopted in the form above, except the last two words, which read "said notice," instead of "such notice."

2079. Articles of impeachment being presented, the Senate is required by its rule to proceed to prompt consideration thereof.

Before consideration of articles of impeachment, the Presiding Officer is required by rule to administer the oath to the Senators present, and later to others as they may appear.

The Senate, in its rules, has refrained from prescribing an oath for the Chief Justice when he presides at an impeachment trial.

The Senate is required by rule to continue in session from day to day, Sundays excepted, during impeachment trials, unless otherwise ordered.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule III of the Senate for impeachment cases.

Rule III, of the "Rules of procedure and practice of the Senate when sitting on impeachment trials," is as follows:

Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation or, sooner, if ordered by the Senate, proceed to the consideration of such articles, and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until judgment shall be rendered, and so much longer as may, in its judgment, be needed. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same.

This rule, which formulated the practice of previous trials, dates from 1868,[25] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a series of rules for the proceedings incident to the impeachment of President Johnson. This rule was reported in form as follows:

III. Upon such articles being presented to the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if so ordered by the Senate, resolve itself into a high court of impeachment for proceeding thereon. A quorum of the Senate shall constitute a quorum of the court, and it shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the court) until final judgment shall be rendered, and so much longer as it may, in its judgment, be needful. Immediately upon the Senate resolving itself into such high court of impeachment the Secretary of the Senate shall administer to the Presiding Officer (unless he shall be the Chief Justice) the oath required by the Constitution of the United States in such cases, and in the form hereinafter prescribed, and thereupon the Presiding Officer shall administer such oath to the Members of the Senate then present, and to the other Members of the Senate as they shall appear whose duty it shall be to take the same.

The wording of this language, with its references to the "high court of impeachment" and the quorum thereof, gave rise to a discussion [26]

[24] Second session Fortieth Congress, Journal, pp. 248, 811; Globe, p. 1521; Senate Report No. 59.
[25] Second session Fortieth Congress, Senate Report No. 59.
[26] Globe, p. 1521 et seq.

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as to the constitutional status of the Senate in such procedure; and resulted in amendment[27] striking out those words, and bringing the rule in this respect to its present form. Another question arose over a proposition to strike out the words providing for administering the oath to the Presiding Officer. Mr. Charles R. Buckalew, of Pennsylvania, said:

I think the Presiding Officer of the court of impeachment should be under oath, but it should be an oath different from that taken by the Members who try the case. In the rule, as reported to us, it was contemplated that the same oath should be administered to him that was administered to the Members of the Senate. I believe in former impeachment trials the Presiding Officer was sworn. There may be some difficulty about our prescribing an oath for the Presiding Officer. I think it very clear that by an act of Congress the form of an oath to be taken by the Presiding Officer might be provided, and that it would be binding. It seems an anomaly that we should have a Presiding Officer sitting here and not under any legal obligation or any moral obligation such as an oath would impose. I agree that the amendment already made excepting him from the operation of the general form of oath provided for Members of the Senate is eminently just and proper; and his exception becomes indispensable after the decision which has been made by the Senate on several occasions, withdrawing him altogether from any interference with our proceedings except on questions of order. I suppose, Mr. President, we have the same power to prescribe an oath for the Presiding Officer of the Senate that we have to prescribe an oath for the Members of the Senate, if indeed, there be any authority to bind him by such an obligation.

Mr. Stephen C. Pomeroy, of Kansas, said:

The Chief Justice of the United States is under oath. When he entered upon the discharge of his functions as Chief Justice, he took an oath to discharge all the duties that were incumbent upon him as such officer; and this duty is placed upon him by the Constitution of the United States, and was embraced in his oath to discharge his duties as Chief Justice of the United States; and any further oath than that I think would be unnecessary.

* * * I beg leave to say to the Senator from Pennsylvania that the reason why Senators have to be sworn, in addition to their usual oath as Senators, is that it is provided for by the Constitution, which says that "When sitting for that purpose they shall be on oath or affirmation;" and goes on, "When the President of the United States is tried, the Chief Justice shall preside," but it does not say that the Chief Justice shall be sworn. In the same sentence in which the Constitution provides that the Senate shall be sworn when sitting to try an impeachment, it says that the Chief Justice shall preside, and, of course, in the absence of any requirement of a special oath, we are to understand that he is sworn to the discharge of his duties, and this duty among the rest, when he took his oath of office. I believe that is all the oath required of him.

The amendment was agreed to, bringing the latter portion of the rule into the form now existing.

2080. Form of oath to be administered to Senators sitting in impeachment trials.

The Senate declined to require that the Chief Justice be sworn when about to preside at an impeachment trial.

Present form and history of Senate Rule XXIV as to impeachments.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF OATH TO BE ADMINISTERED TO THE MEMBERS OF THE SENATE SITTING IN THE TRIAL OF IMPEACHMENTS

"I solemnly swear (or affirm, as the case my be) that in all things appertaining to the trial of the impeachment of ——— ———, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

[27] Globe, pp. 1602, 1603.

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This is the form agreed to in 1868.[29]

As originally reported the form of oath for Members of the Senate has this heading:

Form of oath to be administered to the Presiding Officer and Members of the Senate.

Mr. Charles D. Drake, of Missouri, raised the point [30] that the Constitution did not require the Presiding Officer to be sworn, but only the Senators. Some discussion arose over this question. Mr. Charles R. Buckalew, of Pennsylvania, thought the Presiding Officer should be sworn.

Mr. Stephen C. Pomeroy, of Kansas, said that the Chief Justice was already sworn to perform his duties, and this was part of his duties as Chief Justice.

The Senate, without division, agreed to an amendment striking out the words "Presiding Officer and" from the heading.

2081. In 1876 the Senate doubted its authority to empower its Presiding Officer to administer to Senators the oath required for an impeachment trial.

In the Belknap trial the oath to Senators was administered by the Chief Justice until by law authority was conferred on the Presiding Officer of the Senate.

On April 5, 1876,[31] in the Senate pending proceedings for the impeachment of William W. Belknap, Secretary of War, Mr. George F. Edmunds, of Vermont, said:

I wish to ask the attention of the Senate to a matter which I, after consultation with as many Senators as I could find, think it necessary to bring to the notice of the Senate respecting the matter of the impeachment to-day. The third rule of the Senate in regard to impeachments provides that on this day at one o'clock—

"The Presiding Officer shall administer the oath hereinafter provided to the Members of the Senate then present, and to the other Members of the Senate as they shall appear, whose duty it shall be to take the same."

But on examination we are unable to find any statute of the United States which authorizes the President of the Senate or the Presiding Officer to administer this oath. It stands upon the rule alone. The language of the statute about the authority of the Presiding Officer is that, when Senators appear to take their seats upon an election to this body, the Presiding Officer shall swear them in, and any Senator may administer a similar oath to the Vice-President, the President of the Senate, when he appears; and there the statute stops except in respect of witnesses who are by law to be sworn by the President of the Senate.

In this state of difficulty and in the very grave doubt, at least, that in the minds of all the gentlemen whom I have been able to consult there is about this being a constitutional compliance with that requirement which obliges us to be under oath (which, of course, implies a legal and binding oath), we have thought it best for this occasion, until provision can be made by law, to submit to the Senate a proposition that the Chief Justice of the United States be invited to attend at one o'clock to-day to administer these oaths, there being no question about his authority to do so. Therefore, Mr. President, I ask unanimous consent that this portion of Rule 3 which I have read, respecting the administration of the oath by the Presiding Officer, shall be suspended for this day; and if that be unanimously agreed to, as of course it requires unanimous consent to suspend this rule, I shall then offer an order which will accomplish the next step in the matter.

In accordance with this suggestion the rule was suspended, and the order referred to by Mr. Edmunds was submitted and agreed to.

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[29] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 244-246; Globe, pp. 1590-1593.

[30] Globe, p. 1603.

[31] First session Forty-fourth Congress, Senate Journal, p. 394; Record, p. 2212.

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To remedy this difficulty a bill was prepared, passed both Houses, and was approved by the President on April 18, 1876.[32] This empowers the Presiding Officer of the Senate for the time being to administer all oaths or affirmations that are or may be required by the Constitution or by law to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate. Also the Secretary and Chief Clerk of the Senate are respectively empowered to administer any oath or affirmation required by law, or by the rules or orders of the Senate to be taken by any officer of the Senate, or by any witness produced before it.

In accordance with this law the President pro tempore, on April 27,[33] administered the oath required of Senators sitting for impeachment trials, to Mr. Bainbridge Wadleigh, of New Hampshire.

2082. When the President of the United States is impeached the Chief Justice of the Supreme Court presides.

When the Chief Justice is to preside at an impeachment trial the Presiding Officer of the Senate is required by rule to give him notice of time and place and request his attendance.

The Senate by rule have implied that the Chief Justice attends and presides only after the articles of impeachment have been presented.

In 1868 the Senate eliminated from its rules all mention of itself as a "high court of impeachment."

Present form and history of Rule IV of the Senate sitting for impeachment trials.

Rule IV of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

When the President of the United States or the Vice-President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

The discussion of the constitutional status of the Senate in impeachment proceedings, incident to the adoption of rules in 1868, resulted in the present form of the rule. The committee having the subject of rules under consideration at that time, reported[34] it as a new rule in form as follows:

IV. The Presiding Officer of the Senate shall be presiding officer of the high court of impeachment, except when the President of the United States, or the Vice-President of the United States upon whom the powers and duties of the office of President shall have devolved, shall be impeached, in which case the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside, notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the organization of the high court of impeachment as aforesaid, with a request to attend, and he shall preside over said court until its final adjournment.

On March 2,[35] after the debate as to the use of the words "high court

[32] 19 Stat. L., p. 34.
[33] Senate Journal, p. 916; Record of trial, p. 8.
[34] Second session Fortieth Congress, Senate Reports, p. 59.
[35] Senate Journal, p. 812; Globe, pp. 1602, 1603.

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of impeachment," amendments were offered by Mr. Orris S. Ferry, of Connecticut, and agreed to, which brought the rule to its present form. The debate on this rule showed the understanding to be that the Chief Justice should not be notified to attend and preside until after the articles of impeachment had been presented.

2083. In impeachments the Presiding Officer of the Senate is empowered by rule to make and issue, by himself or by the Secretary, authorized orders, writs, precepts, and regulations.

Present form and history of Rule V of the Senate sitting for impeachment trials.

Rule V of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," provides:

The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

This rule dates from 1868, when it was reported [36] in nearly its present form by the committee having in charge the rules to be adopted in view of the impeachment of President Johnson. It was changed to its present form by substituting the word "Senate" for "Court" in two places, in accordance with conclusions arrived at after discussion as to the constitutional status of the Senate.[37]

2084. The preparations in the Senate Chamber for an impeachment trial are directed by the Presiding Officer of the Senate.

During an impeachment trial the Presiding Officer on the trial directs all forms not otherwise specially provided for.

The Presiding Officer on an impeachment trial may make preliminary rulings on questions of evidence and incidental questions or may submit such questions to the Senate at once.

The preliminary rulings of the Presiding Officer on an impeachment trial stand as the judgments of the Senate, unless some Senator requires a vote.

On questions of evidence and incidental questions arising during an impeachment trial the voting is without division unless the yeas and nays are demanded by one-fifth.

Discussion of the propriety of the Presiding Officer on an impeachment making a preliminary decision on questions of evidence.

Discussions of the functions of the Chief Justice in decisions as to evidence in an impeachment trial.

In the Johnson trial Chief Justice Chase held that the managers might not appeal from a decision of the Presiding Officer as to evidence.

Present form and history of Rule VII of the Senate sitting for impeachment trials.

Rule VII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials," is as follows:

The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying

[36] Second session Fortieth Congress, Senate Report No. 59.
[37] Senate Journal, pp. 230, 812; Globe, pp. 1526, 1602.

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an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present, when the same shall be taken.

The first sentence of the rule is the substance of Rule VII, adopted in 1805[38] at the time of the trial of Judge Chase. In 1868, at the time of the proceedings for the impeachment of President Johnson, the committee of which Mr. Jacob M. Howard, of Michigan, was chairman, reported[39] it in substantially its present form. in the first draft the word "court" was generally used instead of "Senate;" but in accordance with a general principle established at that time that phraseology was changed.[40] Also the draft reported from the committee did not contain the last sentence of the present form.

On March 2,[41] while the report was under debate, Mr. Charles D. Drake, of Missouri, moved to strike out these words:

And the Presiding Officer of the court may rule all questions of evidence and incidental questions, which rulings shall stand as the judgment of the court, unless some member of the court shall ask that a formal vote be taken thereon, in which case it shall be submitted to the court for decision; or he may, at his option, in the first instance, submit any such question to a vote of the members of the court,

and insert in lieu thereof:

The Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions, but the same shall, on the demand of one-fifth of the Members present, be decided by yeas and nays.

The words to be inserted were suggested by Mr. Jacob M. Howard, of Michigan.

A long debate resulted on this motion.

Mr. Drake explained his reasons:

The Constitution simply says that when the President of the United States is tried the Chief Justice shall preside. In that position he has just exactly the same powers and functions that the Vice-President would have in any other case of impeachment, and no more. Now, sir, any man in the country, whether a lawyer or not, may, in the course of events, come to fill the position of Vice-President of the United States. Suppose that a man who had never been a lawyer, never made law his study, and did not know anything at all about the complex rules of evidence in the courts of justice were to be elevated to the Vice-Presidency, and the Senate should consist, as it does now, of a large majority of those who have made the law their study during a large portion of their lives, and he should be set up in the chair as the Presiding Officer of that body to decide questions of law. I will venture to say that the Senate would regard it as quite preposterous.

Now, sir, why should we set the Chief Justice there to decide these questions? We can not do it, in my opinion, without a violation of the spirit of the Constitution, which does not entitle him to any more prerogatives as the Presiding Officer of the court than the Vice-President would have in other cases.

But, sir, there is a very grave objection to this. Even taking the distinguished Chief Justice of the United States, so justly distinguished for his great mind and his great knowledge of the law, it is not proper, it is not judicious, it is not for the purposes of justice expedient that the Senate, sitting as a court of impeach-

[38] Second session Eighth Congress, Senate Journal, pp. 511-513; Annals, pp. 89-92.
[39] Second session Fortieth Congress, Senate Report No. 59.
[40] Globe, pp. 1602, 1603; Journal, pp. 247, 248, 812.
[41] Senate Journal, pp. 247, 248; Globe, pp. 1595-1602.

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ment, should ever be brought to the point of overruling a decision made by the Chief Justice of the United States sitting in the chair as the Presiding Officer of the court. It is not proper that the judgment of the Senate upon questions of law, which it must ultimately decide, if a single Senator demands its decision, should be warped, or if not warped, in any degree affected by the previous announcement of an opinion upon that question by so high a judicial officer as the Chief Justice.

Sir, it might be that, on some future occasion, when a President of the United States should be impeached again, the Chief Justice might be a very strong opponent of his, or a very strong advocate of his, and that his decisions might be influenced one way or the other by the personal considerations or the political considerations which bound him to the President or made him the President's opponent. Under these circumstances, it is not wise or judicious, in my opinion, that we should lay down a rule, not only for this trial but for all other trials, which might bring the Chief Justice, sitting as our Presiding Officer, in continual conflict with the Senate. Let the Senate decide its own questions of law. Let it not, by simple acquiescence, put the Chief Justice there to decide these questions of law. Let them come up to the work themselves and pronounce their own decision, without the necessity of appealing from his decision, and being brought into antagonism with him.

Mr. John Sherman, of Ohio, opposed this view on the ground that the trial would be unnecessarily prolonged were the preliminary decision taken from the Presiding Officer. That was the function of every presiding officer, and he considered that "a departure from the ordinary customs and courtesies extended to presiding officers, especially in a case where the Presiding Officer was made so by the Constitution of the United States," would be a very remarkable circumstance.

Mr. George H. Williams, of Oregon, argued elaborately in the same line:

I say that the Senators alone do not constitute a perfect Senate, but the Vice-President of the United States is a part of the Senate, and has certain functions to perform as a part of the Senate, and his right to vote as an officer of the Senate is recognized under certain circumstances. When the Senators are equally divided, he has a right to vote, for the language is:

"The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided."

That is, unless the Senators be equally divided he shall have no vote; but, if they are equally divided, then he is to have a vote. Certainly he could have no vote under any circumstances unless he did, for certain purposes at any rate, constitute a part of the Senate. Then the Constitution provides that—

"The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice-President or when he shall exercise the office of President of the United States."

Then it says:

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

Does that mean solely and exclusively: that the Senators shall have the sole power to try all impeachments: or does it mean that the Senate as an organized body, constituted under the provisions of the Constitution, shall try an impeachment? I say that it means that the Senate, with the Vice-President of the United States presiding, and the Constitution contemplates that he is to participate in the trial of every impeachment, except where the President of the United States is upon trial.

"When sitting for that purpose they shall be on oath or affirmation."

Does that mean that the Senators alone shall be upon oath or affirmation, or does it mean that the Senate, that all the constituent Members of the Senate who participate in the trial, shall be upon oath or affirmation?

"When the President of the United States is tried, the Chief Justice shall preside."

Now, sir, I understand the Constitution to make the Chief Justice of the United States a part of the Senate when it is engaged in trying an impeachment against the President of the United States. I do not undertake to say that he possesses the power to vote like a Senator; I will not make that declaration at this time;

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but he is a part of the Senate, and I maintain that the Senate, by its rules, may confer upon him such powers as it sees proper in the proceedings of the trial. He is not to be treated, when the Constitution requires him to come here and preside over this body, as a stranger and an interloper, because, under the Constitution, he has as much right to be here as any Member of this body. It is as much his duty to be here as it is the duty of any Member of this body to be here; and if he is here under the Constitution, he is here for certain purposes and must necessarily possess the powers of a presiding officer. Why should there be evinced a kind of jealousy, as it seems to me, on the part of the Senate, lest if the Chief Justice comes in here he may assume to exercise powers which do not belong to him? Are we to assume that position, and hence refuse to give to him those rights and powers and privileges which the Constitution contemplates he should have?

It seems to me that there is a perfect propriety, when the Constitution compels him to come here and preside upon the trial of the President, in allowing him, in the first instance, to decide in that court as he would in the other court where he presides as Chief Justice.

Mr. Thomas A. Hendricks, of Indiana, while not holding that the Chief Justice might vote, considered it eminently proper that he should exercise a preliminary decision:

In the first place, he is an eminent judge, because of his position. Is he not competent, in all probability, to correctly and safely decide the questions that are likely to rise during the progress of the trial? In his office as Chief Justice he participates in the greatest decisions that are made in any court in the world, and as a judge of one of the circuits he presides over the controversies incident to life and property. Shall he not be heard to express in the first place for the Senate a judgment, and if not agreeable, the Senate shall say it is not agreeable? What harm can come of it? It brings the question directly before the body, promptly, conveniently, safely, prudently, in my opinion.

But if he is not to participate that far, to say the least of it, in the business of the body, why has the Constitution been so careful to have him here? Certainly for the purpose merely of presiding and seeing that good order is preserved in the body the Constitution would not be so careful that he should preside. Some power, it is presumed, is to be exercised by him. The Constitution presumes that and what power? To decide questions as they arise in the progress of the case, as questions ordinarily are decided, though subject, of course, to the superior will of the Senate.

Mr. Roscoe Conkling, of New York, who took the view advanced by Mr. Drake, cited precedents:

We may gain information at this point from the practice and precedents under the British constitution. "The House of Lords," called at times "the court of the King in Parliament," was, like the Senate, an entirety; an ascertained, defined body. There was a presiding officer at all times, and his existence and ministration was derived from the constitution as much as from our Constitution proceeds the existence of a presiding officer here. This presiding officer was sometimes a member of the House of Lords—taken from the body to preside in it, as our Presiding Officer for several sessions has been taken from the Members of the Senate. Sometimes the presiding officer in the Lords was made a member of the body contemporaneously with his installment as presiding officer—not having been a peer before, he was ennobled at the time and thus became a member. Sometimes not being a peer, and therefore not a member of the Lords, he presided without a peerage being conferred, and thus he was presiding officer, with all the prerogatives appurtenant to the presiding chair, but still was not a member of the body. By turning to the powers accorded to the Lord Chancellor as presiding officer, and to the duties and prerogatives of the lord high steward of England in the trial of impeachments, we may be able to measure the force of the expression, "When the President of the United States is tried, the Chief Justice shall preside." A distinction has been made between the right to vote and to decide of the lord high steward between a trial before the Lords in Parliament—that is to say before the House of Lords at large and a trial before a commission of the peers. It has been insisted that the lord steward never participated in the decision if the trial was before a chosen number of the peers, but that he did take part in judgment and decision when the trial was before the House of Lords in full.

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Lord Campbell, in his Lives of the Chancellors, refers to this distinction; so does May in his Law of Parliament. But the journal of the House of Lords affords no reason to believe that such a difference of practice in the two tribunals was observed. On the contrary, the question whether the lord steward had or had not a vote or a voice in giving judgment seems to have hinged entirely upon his being merely a presiding officer or being also a member of the House of Lords itself. In virtue of his place as presiding officer he seems in no case to have participated in voting or determining the cause. His right and power and designation to preside seems never to have been supposed to carry with it any permission or obligation to join in deciding questions submitted to the tribunal. In many instances the lord high steward did vote, however, in trials of impeachment, but always in virtue of his being a member of the House, independent of the fact that he was also its presiding officer.

To substantiate this I refer, first, to the case of the Earl of Ferrers, brought to the bar in 1760. The case is reported at length by Sir Michael Foster, one of the judges of the court of king's bench. The earl having been convicted, the House propounded to the judges two questions, one of which went to the power of the presiding officer and of the House without the presiding officer. The judges answered the questions after deliberation, in writing, and the reasoning appears in Foster's Crown Law at page 138 and onward. I read from page 143. Having discussed some matters incident to a trial of a peer before a commission of peers he proceeds:

"But in a trial of a peer in full Parliament, or, to speak with legal precision, before the King in Parliament, of a capital offense, whether upon impeachment or indictment, the case is quite otherwise. Every peer present at the trial (and every temporal peer hath a right to be present in every part of the proceeding) voteth upon every question of law and fact, and the question is carried by the major vote, the high steward himself voting merely as a peer and member of that court in common with the rest of the peers, and in no other right.

"It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the style and title of steward of England. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of Parliament, whether such appointment be made or not.

"It acteth in its judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition according to the nature and circumstance of the case, the allowance or nonallowance of counsel to the prisoner, and other matters relative to the trial, and all this before an high steward hath been appointed; and so little was it apprehended in some cases which I shall mention presently, that the existence of the court depended on the appointment of an high steward, that the court itself directed in what manner and by what form of words he should be appointed. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an high steward, and hath allowed to prisoners the benefit of acts of general pardon, where they appeared entitled to it, as well without the appointment of an high steward as after his commission dissolved."

On the next page, referring to the case of the Earl of Danby, he states certain proceedings between the two Houses of Parliament, and remarks—

"That the Lords' committees said 'The High Steward is but Speaker pro tempore, and giveth his vote as well as the other Lords.'"

And upon this appears the following entry:

"In the Commons' Journal of the 15th of May it standeth thus: Their lordships farther declared to the committee that a Lord High Steward was made hac vice only, that notwithstanding the making of a Lord High Steward the court remained the same and was not thereby altered, but still remained the court of peers in Parliament; that the Lord High Steward was but as a speaker or chairman for the more orderly proceeding at the trials."

This the Commons wished entered on the Lords' Journal.

On page 147, speaking of the law as laid down by the Lords, Sir Michael says:

"The letter of the resolution, it is admitted, goeth no farther, but this is easily accounted for. A proceeding by impeachment was the subject matter of the conference, and the Commons had no pretense to interpose any other. But what

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say the Lords? The High Steward is but as a speaker or chairman pro tempore for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the court, which still remaineth the court of the peers in Parliament. From these premises they draw the conclusion I have mentioned. Are not these premises equally true in the case of a proceeding upon indictment? They undoubtedly are."

This case and the authorities referred to in stating it seem to make it clear that the immemorial understanding in England has been that the officer whose duty it is to preside at trials of impeachment has definite functions, convenient and conducive to order, and the dispatch of business, and that the duty to vote or to decide is not among his duties or his powers. The fact of his presiding or of his being authorized or commissioned to preside, according to these cases, carries with it no right to act as a trier or a member. The same doctrine will be found in Sharswood's Blackstone, at pages 261 and 262 of the second volume. Lord Campbell, in the third volume of his Lives of the Chancellors, page 557, refers to the case of Lord Dellamere, tried in 1686 for complicity with Monmouth. Jeffries was Lord High Steward and seems to have conducted himself with all the brutality to have been expected of him. He began by a harangue to the culprit, urging him, in the presence of the king, to confess. Dellamere interposed to inquire if he was to be one of his judges, to which the Lord High Steward replied, "No, my Lord: I am judge of the court, but I am none of your triers." This trial was not before the House of Lords, but before a commission of peers, and in so far it is not a literal precedent. Here are other cases of antiquity and of note, more or less instructive, cases in which the presiding officer voted, not apparently sui juris, but by reason of his peerage.

In the trial of Lord Lovat, impeached by the Commons for high treason in 1746:

"The Lord High Steward, by a list, called every peer by his name, beginning with the lowest baron, and asked them, 'If Simon, Lord Lovat, was guilty of the high treason whereof he stands impeached or not guilty?'

"And thereupon every Lord, standing up uncovered, answered: 'Guilty, upon my honor,' laying his right hand upon his breast.

"Which done, the Lord High Steward, standing uncovered at the chair, as he did when he put the question to the other Lords, declared his opinion to the same effect and in the same manner." (27 Lords' Journals, p. 76.)

In the trial of the Earl of Oxford and of Earl Mortimer, impeached in 1717:

"The Lord High Steward stated the question before agreed on, and asked every Lord present severally, 'Whether content or not content?'

"And they all answering in the affirmative, as did the Lord High Steward declared his opinion also:

"The Lord High Steward declared that Robert, Earl of Oxford and Earl Mortimer, was, by the unanimous vote of all the Lords present, acquitted of the articles of impeachment exhibited against him by the House of Commons for high treason and other high crimes and misdemeanors, and of all things therein contained." * * * "And then the Lord High Steward stood up uncovered: and, declaring 'that there was nothing more to be done by virtue of the present commission,' broke the staff and pronounced the commission of Lord High Steward dissolved." (20 Lords' Journals, p. 525.)

The same form was observed in the case of Earls Derwentwater et al., impeached for high treason, in 1715.

In Viscount Melville's trial on an impeachment, in 1806, according to the Journal of the House of Lords—

"The Lord Chancellor having asked every Lord present, beginning with the junior baron, 'What says your lordship on this first article?' and the Lords having severally answered thereto, and the Lord Chancellor having declared his opinion also, the said several other questions were in like manner stated, and each Lord was severally asked in manner aforesaid touching the same. And the Lords having severally answered to the same, and the Lord Chancellor having declared his opinion also on each of the said questions, the Lord Chancellor declared that the answer of a majority of the Lords to each of the said questions, respectively, was 'not guilty.'"

Here are cases decided by the Lords without the vote or voice of the presiding officer—cases in which there was a presiding officer with every right as such, but without any participation in the decisions made.

In the case of Lord Chancellor Bacon, in 1621—

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"The House (of Lords) being resumed, and the Lord Chief Justice returned to his place, it was put to the question whether the Lord Viscount St. Albans (Lord Chancellor) shall be suspended from all his titles of nobility during his life or no? and it was agreed per plures that he should not be suspended thereof." (40 Lords' Journals, p. 302.)

In Sacheverell's case, impeached in 1709—

"Then his lordship put the question, beginning at the junior baron first, as follows: 'Is Doctor Henry Sacheverell guilty of high crimes and misdemeanors, charged upon him by the impeachment of the House of Commons?'

"And having asked every Lord present, and they having declared guilty or not guilty,

"His lordship having cast up the votes, declared him guilty." (Ibid.)

In the case of the Earl of Macclesfield, in 1725—

"It was agreed that the question to be put to each Lord, severally, shall be, 'Is Thomas, Earl of Macclesfield, guilty of high crimes and misdemeanors charged on him by the impeachment of the House of Commons, or not guilty?'

"And every Lord present shall declare his opinion, 'guilty or not guilty, upon his honor', laying his right hand upon his breast.

"When the Lord Chief Justice, Speaker of this House, directed the Gentleman Usher of the Black Rod to bring thither the Earl of Macclesfield, who, after low obeisances made, kneeled until the said Lord Chief Justice acquainted him he might rise. (Judgment pronounced. Record of mode of obtaining the votes of the Lords on each resolution is, 'The question was put thereupon; and it was resolved in the affirmative.'") (Ibid.)

Mr. President, there may be arguments on this point which these precedents do not answer, but, it seems to me, they confront the view presented by the Senator from Oregon. The Lord Chancellor and the Lord High Steward of England, by the British constitution, were invested with the prerogatives and powers of presiding officers. Their attributes were more potential, their sway was greater, the examples of their supremacy were more copious, than the genius of our Constitution would tolerate. And if we ascertain the full measure in the less liberal days of British monarchy of what a presiding officer might do, surrounded by peers and commissioned by the King, we shall not fall short at least of the intention of those who adopted the language to which the Senator referred. The framers of our Constitution were profoundly learned in the practice and the meaning of British law, and the word "preside," when used by them, may well be supposed not to have been selected to convey a greater meaning than had been attached to it in the great struggle of privilege and power from which they had derived the philosophy of government.

The amendment proposed by Mr. Drake was agreed to, yeas 21, nays 7.

On March 31, 1868,[42] at the outset of the trial, on the objection of Mr. Henry Stanbery, counsel for the President, to certain testimony, the Chief Justice ruled that the testimony was competent.

Mr. Charles D. Drake, of Missouri, a Senator, at once objected that the question of the competency of evidence should be determined by the Senate and not by the Presiding Officer.

The Chief Justice [43] thereupon said:

The Chief Justice states to the Senate that in his judgment it is his duty to decide upon questions of evidence in the first instance, and if any Senator desires that the question shall then be submitted to the Senate it is his duty to submit it. So far as he is aware that has been the usual course of practice in trials of persons impeached in the House of Lords and in the Senate of the United States.

Thereupon Mr. Manager Benjamin F. Butler, seconded by Messrs. John A. Bingham and George S. Boutwell, urged on behalf of the House of Representatives, (*a*) that the Chief Justice might not make such preliminary decision, and (*b*) that such decision having been

[42] Second session Fortieth Congress, Globe Supplement, pp. 59–63; Senate Journal, pp. 867–870.

[43] Salmon P. Chase, of Ohio, Chief Justice.

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made by the Chief Justice the managers as well as any Senator might call for a decision of the Senate. In presenting their views the managers quoted at length from English precedents.

The Chief Justice, stating his position more fully, said:

The Chief Justice will state the rule which he conceives to be applicable once more. In this body he is the Presiding Officer; he is so in virtue of his high office under the Constitution. He is Chief Justice of the United States, and therefore, when the President of the United States is tried by the Senate, it is his duty to preside in that body, and, as he understands, he is therefore the President of the Senate sitting as a court of impeachment. The rule of the Senate which applies to this question is the seventh rule, which declares that "the Presiding Officer may, in the first instance, submit to the Senate, without a division, all questions of evidence and incidental questions." He is not required by that rule so to submit those questions in the first instance; but for the dispatch of business, as is usual in the Supreme Court, he expresses his opinion in the first instance: If the Senate, who constitute the court, or any Member of it, desires the opinion of the Senate to be taken, it is his duty then to ask for the opinion of the court.

Mr. Manager Butler having asked whether the right to ask the opinion of the Senate would extend to a manager, the Chief Justice replied:

The Chief Justice thinks not. It must be by the action of the court or a member of it.

The Senate having retired for consultation, Mr. John B. Henderson, of Missouri, proposed an amendment to Rule VII which in effect struck out all after the first sentence of the present draft of the rule and inserted what is now the second sentence. This amendment was agreed to, yeas 31, nays 19, after the Senate had by a vote of yeas 20, nays 30, disagreed to the following declaration proposed by Mr. Drake:

It is the Judgment of the Senate that under the Constitution the Chief Justice presiding over the Senate in the pending trial has no privilege of ruling questions of law arising thereon, but that all such questions should be submitted to a decision by the Senate alone.

The last sentence of the rule relating to method of voting was not included by the above proceedings, and on April 1, 1868,[44] when a vote was about to be taken on a question of evidence, Mr. Drake insisted that, under Rule XXIII, and in the absence of a provision in Rule VII, the vote should be taken by yeas and nays.

But the Chief Justice decided:

Upon the question of order raised by the Senator from Missouri, the Chair is of opinion that he may submit this question to the Senate without having the yeas and nays taken, unless the yeas and nays are demanded by one-fifth of the Members present.

On April 2, 1868,[45] Mr. Drake proposed the following addition to the rule:

Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the Members present or requested by the Presiding Officer, when the same shall be taken.

When the proposition came up for action on the next day, on motion of Mr. George F. Edmunds, of Vermont, the words "or requested by the Presiding Officer" were stricken out, and then the amendment as amended was agreed to without division.

Thus the rule attained its present form.

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[44] Globe Supplement, p. 70.
[45] Journal, pp. 874, 878; Globe Supplement, pp. 77, 92.

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2085. The Presiding Officer during an impeachment trial sometimes rules preliminarily on evidence and cautions or interrogates witnesses.—In the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [46] of the Senate presided. On questions arising over the admissibility of testimony he usually submitted the questions directly to the Senate for decision, without expressing a preliminary judgment.[47] In five instances, on questions wherein the principles had already been passed on by the Senate, he ruled.[48] In two cases he ruled on questions not already determined by the Senate, but announced that if counsel requested he would submit the matter.[49]

2086. On February 13, 1805,[50] in the high court of impeachment, during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Basset, was testifying, when the following occurred:

The WITNESS. The court considered me a good juror, and I was sworn accordingly. After the trial had been gone through, the jury retired to their room. I informed the jury that I thought we should have the book read through.

The President [51] here stopped the witness, and informed him that it was useless waste of time to relate what took place in the room of the jury.

The witness, however, continuing the statement he had previously begun, the President desired him to go on, if it were necessary for the purpose of connecting the testimony he had to give; but to pass over what occurred among the jury as briefly as possible.

2087. On April 1, 1868,[52] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, while Mr. Manager Butler was examining a witness, the Chief Justice,[53] who was presiding, interposed and asked a question of the witness.

Also again, on April 2,[54] the Chief Justice interrogated William E. Chandler, a witness.

2088. An instance wherein a President pro tempore presiding at an impeachment trial declined to entertain an appeal from his decision on a point of order.

Rigid enforcement of the rule that decisions of the Senate sitting for an impeachment trial shall be without debate.

On June 26, 1862,[55] in the high court of impeachment, during the trial of the cause of the United States *v.* West H. Humphreys, a question arose as to the form in which the court should pronounce judgment, and debate was going on, when Mr. Garrett Davis, of Kentucky, was called to order by Mr. Benjamin F. Wade, of Ohio, who insisted that the rule that "all decisions shall be had by ayes and noes and without debate," should be enforced.

The President pro tempore [56] said:

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[46] T. W. Ferry, of Michigan, President pro tempore.
[47] First session Forty-fourth Congress, Record of Trial, pp. 189, 192, 195, 205, 208, 219, etc.
[48] Pages 192, 211, 221, 222, 224.
[49] Pages 236, 256.
[50] Second session Eighth Congress, Annals, p. 222.
[51] Aaron Burr, of New York, Vice-President and President of the Senate.
[52] Second session Forty-first Congress, Globe Supplement, p. 72.
[53] Salmon P. Chase, of Ohio, Chief Justice.
[54] Globe Supplement, p. 89.
[55] Second session Thirty-seventh Congress, Globe, p. 2953.
[56] Solomon Foote, of Vermont, President pro tempore.

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The rule is very explicit, leaves no room for doubt that these questions are to be decided without debate.[57]

Mr. Davis then proposed an appeal from the decision.

The President pro tempore declined to entertain the appeal.

The President pro tempore did not explain this decision, but when Mr. John P. Hale, of New Hampshire, questioned it, Mr. O. H. Browning, of Illinois, said:

I think an appeal can not be taken from the judgment of the presiding officer of a court.

2089. The Senate elected a presiding officer for the Swayne trial, and gave him the powers of the President of the Senate for signing orders, writs, etc.—On January 24, 1905,[58] the President pro tempore (William P. Frye, of Maine) in the Senate sitting in legislative session, requested that he be relieved of the duty of presiding at the impeachment trial of Judge Charles Swayne. Thereupon the Senate chose Mr. Orville H. Platt, of Connecticut, as presiding officer for the trial.

On the same day Mr. John C. Spooner, of Wisconsin, chairman of the Committee on Rules, made a statement as follows:

Mr. President, the rules of the Senate governing the sessions of the Senate when it is sitting in the trial of impeachments seems to draw a distinction between the Presiding Officer of the Senate and the presiding officer on the trial. Rule V provides:

"The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide."

The forms of summonses and subpoenas are all signed by the Presiding Officer of the Senate. In order to remove all possible question as to who shall sign the mandates of the Senate, including subpoenas, I offer the regulation which I send to the desk. * * *

The Constitution invests each House with the power, without limit, to make its own rules of procedure. Under the Constitution the function of trying impeachment cases devolves upon the Senate, and the provision of the Constitution must be construed as authorizing the Senate to make the rules which it may deem necessary for the proper discharge of all of the duties and functions developed upon it by the Constitution. The Senate has, I think, within its power and with perfect propriety under the circumstances, appointed a Senator to preside, using the language of the rule to be, "the presiding officer on the trial." That clearly vests in him the functions, as I think, of passing upon the admissibility of evidence and upon the various questions which may arise in the course of the trial.

This question is one which must be determined at once, for a summons is to be issued to Judge Swayne to appear, and it is important, of course, that there shall be no doubt that the officer signing the summons has the power to do so.

Mr. Spooner offered the following resolution, which was agreed to by the Senate:

Resolved, That the presiding officer on the trial of the impeachment of Charles Swayne, judge of the United States in and for the northern district of Florida, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the rules of procedure and practice in the Senate when sitting on impeachment trials and by the Senate.

2090. The Secretary of the Senate records proceedings in impeachments as he records legislative proceedings.

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[57] See Rule XIV as framed for trial of Judge Chase. The language of the entire rule suggests a question as to this interpretation. The present Rule XXIII modifies this rule materially.

[58] Third session Fifty-eighth Congress, Record, pp. 1289, 1291.

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The proceedings of an impeachment trial are reported like the legislative proceedings.

Present form and history of Rule XIII of the Senate sitting for impeachments.

Rule XIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

This rule was framed in 1868,[59] preparatory to the impeachment of President Johnson.

2091. In an impeachment trial all preliminary or interlocutory questions and all motions are argued not over an hour on a side.

The Senate, by order, may extend the time for the argument of motions and interlocutory questions in impeachment trials.

In arguing interlocutory questions in impeachment trials the opening and closing belong to the side making the motion or objection.

The Senate declined to sanction unlimited argument on interlocutory questions in impeachment trials.

The rule limiting the time of arguments on interlocutory questions in impeachment trials does not limit the number of persons speaking.

Present form and history of Rule XX of the Senate sitting for the trial of an impeachment.

Rule XX of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

This rule dates from 1868, when the rules were revised preparatory to the trial of President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported[60] the rule in this form:

XX. All preliminary or interlocutory questions and all motions shall be argued by one person only on each side, and for not exceeding one hour on each side, unless the court shall, by order, extend the time.

This rule was debated at great length and amended to its present form on March 2.[61] It was first objected by Mr. Charles D. Drake, of Missouri, that there should be a provision giving the opening and closing to the one making the motion or objection, and also dividing the time. Mr. Roscoe Conkling, however, answered this satisfactorily by saying that the committee had considered the question, and concluded that the provisions would be unnecessary, since it was habitual for the counsel making the motion or raising the objection to yield after taking a portion of his time, and then conclude after his opponent. The committee conceived that this would be the practice under this rule.

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[59] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

[60] Second session Fortieth Congress, Senate Report No. 59.

[61] Senate Journal, pp. 241, 242, 814; Globe, pp. 1568–1580.

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Mr. Frederick T. Frelinghuysen, of New Jersey, moved an amendment striking out the provision limiting the argument to one person on each side, which was agreed to without division. A motion by Mr. Frelinghuysen to change the time limit from one to two hours was disagreed to, yeas 20, nays 24, and a third amendment proposed by him, to add at the end the words "before the argument commences," was disagreed to—yeas 10, nays 33.

Mr. James W. Grimes, of Iowa, proposed to strike out the rule altogether, as contrary to the Senate's practice of unlimited debate, and as an innovation on the practice of all preceding impeachment trials. It was argued that interlocutory questions might be of the greatest importance, and that the argument thus limited might be one on which the result hinged. On the other hand, it was urged that impeachment trials, notably in England, were often prolonged, and that the Senate should provide against this at the outset. The motion to strike out was disagreed to—yeas 19, nays 23.

So the rule was left in its present form.

2092. On April 1, 1868,[62] during the trial of President Johnson, a question arose, and the Chief Justice [63] said:

Senators, the Chair will state the question to the Senate. The twentieth rule provides that—

"All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time."

The twenty-first rule provides:

"The case on each side shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the the House of Representative."

On looking at these two rules together, the Chief Justice was under the impression that it was intended by the twentieth rule to limit the time, and not limit the persons; whereas, by the twenty-first rule, it was intended to limit the number of persons and leave the time unlimited; and he has acted upon that construction. He will now, with the leave of the Senate, submit to them the question: Does the twentieth rule limit the time without respect to the number of persons? Upon that question the Chair will take sense of the Senate.

The question being put, it was decided in the affirmative nem. con.

The Chief Justice then said:

The Senate decides that the limitation of one hour has reference to the whole number of persons to speak on each side, and not to each person, severelly; and will apply the rule as thus construed.

2093. On April 27, 1876,[64] during the proceedings in the trial of W. W. Belknap, late Secretary of War, the counsel for the respondent moved a postponement of the further hearing of the case until the first Monday of the next December, and for the discussion of this motion Mr. Matt H. Carpenter, of counsel for the respondent, asked that the Senate make an order temporarily modifying the rule, so as to admit of two hours on a side. This request was granted by the Senate by a vote of yeas 48, nays 13, an order to that effect being offered and acted on at the same sitting.

2094. In impeachment trials all orders and decisions of the Senate, with certain specified exceptions, are by the yeas and nays.

During impeachment trials in the Senate the yeas and nays on adjournment are procured by one-fifth and not by rule.

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[62] Globe Supplement, p. 70

[63] Salmon P. Chase, of Ohio, Chief Justice.

[64] First session Forty-fourth Congress, Senate Journal, p. 921; Record of trial, p. 10.

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The orders and decisions of the Senate in impeachment cases are without debate, unless in secret session.

Debate in secret session of the Senate sitting on impeachment trials is limited by rule.

On the decision of the final question in an impeachment case, debate in secret session of the Senate is limited to fifteen minutes to each Senator.

Present form and history of Rule XXIII of the Senate sitting for impeachment trials.

Rule XXIII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

This rule dates from 1868,[65] when a committee reported a revision in preparation for the trial of President Johnson. The rule was debated on March 2 [66] and was amended in matters of detail, so it stood practically in its present form as far as the last sentence, which had not at that time been added.

On March 13,[67] in the Senate as organized for the trial, Mr. Roscoe Conkling, or New York, arose and said:

To correct a clerical error in the rules or a mistake of the types which has introduced a repugnance into the rules, I offer the following resolution by direction of the committee which reported the rules:

"*Ordered*, That the twenty-third rule, respecting proceedings on trial of impeachments, be amended by inserting after the word 'debate' the words 'subject, however, to the operation of rule seven.'"

If thus amended the rule will read:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record and without debate, subject, however, to the operation of rule seven, except when the doors shall be closed, etc."

The whole object is to commit to the Presiding Officer the option to submit a question without the call of the yeas and nays, unless they be demanded. That was the intention originally, but the qualifying words were dropped out in the print.

The order was agreed to without division.

The last sentence of the rule, "the fifteen minutes herein allowed," etc., was added on March 7, 1868, on motion of Mr. Charles Drake, of Missouri, immediately before the Senate proceeded to pronounce judgment in the case of President Johnson.[68]

On July 31, 1876,[69] when the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, was about to proceed to judgment, Mr. Hannibal Hamlin, a Senator from Maine, proposed an amendment which would have stricken out the words "except when the doors shall be closed for deliberation." This amend-

[65] Second session Fortieth Congress, Senate Report No. 59.
[66] Senate Journal, pp. 243, 244, 814; Globe, pp. 1588, 1589, 1602.
[67] Senate Journal, pp. 824, 825; Globe Supplement, p. 6.
[68] Senate Journal, p. 937; Globe Supplement, p. 408.
[69] First session Forty-fourth Congress, Record of trial, p. 341.

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ment was proposed in connection with one to Rule XIX, which would have abolished secret sessions in impeachment trials. The Senate, by a vote of yeas 23, nays 32, declined to consider either amendment.

2095. In the Senate, sitting for impeachment trials, the doors may be closed for consultation on motion put and carried.—On February 16, 1905,[70] in the Senate, sitting for the impeachment trial of Judge Charles Swayne, a question arose as to the admissibility of certain evidence, and Mr. Joseph W. Bailey, a Senator from Texas, moved that the doors be closed for deliberation, or, in case the motion should be otherwise, that the Senate retire to its conference chamber.

A question arose as to the interpretation of the rule, and the Presiding Officer said:

The rule is as follows:

"All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate."

The Presiding Officer is of the opinion that the consent of the Senate applies to the time during which a Senator may speak upon a question, and not to the question whether the Senate may proceed in the Senate Chamber as a court without closing the doors.

Mr. Bailey thereupon asked unanimous consent that the doors be closed. There being objection, he made a motion.

The Presiding Officer said:

The Presiding Officer will submit the motion to the Senate. Will the Senate order the doors to be closed for the purpose of deliberating upon the question?

There appeared yeas 53, nays 18. So the doors were closed.

2096. Secret sessions of the Senate to discuss incidental questions arising during an impeachment trial.—On May 14, 1876,[71] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, the doors were closed and the galleries cleared, while deliberation was going on as to the question of the jurisdiction of the Senate to try a civil officer who had resigned and whose resignation had been accepted. And the Senate continued to deliberate with closed doors until the decision of the question, on May 29.

2097. On July 19, 1876[72] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, it was ordered that the floor and galleries be cleared, and that the doors be closed. The session thereupon was held in secret, while determination was reached as to certain propositions relating to the time of beginning the taking of testimony, to the filing of a paper presented by counsel for respondent, and to the propriety of continuing the trial at a time when the House of Representatives was not in session.

2098. On the final question whether an impeachment is sustained, the yeas and nays are taken on each article separately.

If an impeachment is not sustained by a two-thirds vote on any article a judgment of acquittal shall be entered.

If the respondent be convicted by a two-thirds vote on any article of impeachment the Senate shall pronounce judgment.

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[70] Third session Fifty-eighth Congress, Record, p. 2720.

[71] First session Forty-fourth Congress, Senate Journal, pp. 993–947; Record of trial, pp. 72–77.

[72] First session Forty-fourth Congress, Journal of Senate, p. 954; Record of trial, p. 172.

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A certified copy of the judgment in an impeachment case is deposited with the Secretary of State.

Discussion as to whether or not the Chief Justice, presiding at an impeachment trial, is entitled to vote.

The reasons for eliminating from the Senate rules for impeachment trials the words "high court."

Present form and history of Rule XXII of the Senate sitting for impeachment trials.

Rule XXII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the Members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

This rule was framed in 1868,[73] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules in view of the approaching trial of President Johnson. As reported the rule was as follows:

XXII. If the impeachment shall not be sustained by the votes of two-thirds of the Members of said high court of impeachment present and voting a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the Members of such court present the court, by its Presiding Officer, shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

On motion of Mr. Frederick T. Frelinghuysen, of New Jersey, and without division, an amendment was inserted [74] at the beginning, in the following words:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately and;

Then Mr. Lot M. Morrill, of Maine, proposed an amendment [75] so changing the first clause of the rule that it would read:

On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately, and if the impeachment shall not be sustained by the votes of two-thirds of the Senators present a judgment of acquittal shall be entered.

This proposition, by substituting the words "Senators" for "high court of impeachment," brought up the question as to whether or not the Chief Justice would have a vote. Mr. John Sherman, of Ohio said:

Now, if a Presiding Officer is elected by the Senate, either on account of the sickness or absence or inability of the Vice-President to preside, he would undoubtedly have a right to vote. The Presiding Officer would undoubtedly have a right to vote, because he is not only a Senator having a personal right to his seat as a Senator, but he is a representative of a State, and that State would have a right to vote; and his mere election as Presiding Officer would not disfranchise him from voting.

Under these circumstances, when the President is to be tried, the Constitution declares, the Senate still having the sole power to try all impeachments, that the

[73] Second session Fortieth Congress, Senate Report No. 59.
[74] Senate Journal, p. 243; Globe, p. 1585.
[75] Senate Journal, p. 243; Globe, pp. 1585–1587.

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Chief Justice shall preside over that tribunal. What does that mean? That he shall be here simply as a figurehead? No, sir. In every case where a man is made the presiding officer of any tribunal, of any convention, of any political body, it necessarily implies the right to vote, unless that implication is excluded by the instrument itself. There is no doubt whatever but that the Vice-President of the United States could vote every day in our proceedings but for one thing; and that is, that the Constitution carefully excludes him from the right to vote except in case of a tie. But who doubts that but for that single clause of the Constitution which declares that the Vice-President of the United States shall not vote except in case of a tie he could do it? Suppose the clause read "the Vice-President of the United States shall be President of the Senate:" suppose it stopped there; would not the Vice-President have a right to vote? The very implication drawn from the fact that he is the Presiding Officer of the Senate would give him a vote; but it goes and says, "but shall have no vote unless they be equally divided." The very fact that this language was used to exclude him from the right to vote shows that in the absence of that language he would have the right to vote.

And, sir, when the Chief Justice is substituted in the place of the Presiding Officer of this body, without any exclusion from the right to vote, without any exception made as against him, he is made a member of this court, to participate in the proceedings of this court; and it does seem to me, in the absence of all other precedents of exclusion or constitutional provision, he would have a right to vote. I do not know that the Chief Justice would take the same view of it or desire to vote, but it does seem to me that the Constitution, by substituting his high officer here as the Presiding Officer of this body, did not intend to make him a mere instrument or medium to put a question to the body, but intended to make him a part of the tribunal or court to try the case.

Mr. Howard, of Michigan, said:

The amendment of the Senator from Maine adopts, in effect, the language of the Constitution itself, as I understand it; and so far I think it entirely proper to be adopted. I must, however, now and at all times, so far as I can see my way, repel the idea that the Chief Justice is a member of the so-called court of impeachment, or has any right to vote during the deliberations of that court, or upon any question arising during the trial. I do not propose to go into it further now, although I see the gravity of the question, and have for some time been entirely sensible of it.

I will say, however, before I take my seat, that if we regard the analogies presented to us in the constitutional history of England, the same result which I claim to be the truth here will be arrived at. The House of Lords sit as a high court of impeachment. They are presided over when thus sitting either by the Lord Chancellor or the Lord High Steward; and the precedents are numerous and clear that the Lord Chancellor, although thus presiding, or the Lord Steward thus presiding, has no vote in the House of Lords in virtue of his presidency of the body; but if he be a peer he has, in right of his peerage, the right to vote; but it is put upon that ground, and that ground only. As president of the body he has no right even to decide questions where the body is equally divided.

Mr. Roscoe Conkling, of New York, referred to the important question raised and suggested that, to avoid that question, the amendment be modified so as to read "members present" instead of "Senators present." That would be the very language of the Constitution.

Mr. Morrill finally yielded to that request and the modified amendment was agreed to without division.

A little later the Senate recurred to Rule VII again, and after discussion of the powers of the Chief Justice in presiding, determined upon such amendment of that and other rules as to eliminate the words "high court of impeachment" wherever they occurred, the object evidently being to remove all idea that the Chief Justice had any other function than to preside.[76] In fact, the Chief Justice did vote on an

[76] See Proceedings on Rule VII and on functions of the Senate sitting for the trial. Section 2084 of this volume.

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occasion when the vote of the Senate was a tie,[77] on March 31, but did not vote in the final judgment.[78]

Mr. Peter G. VanWinkle, of West Virginia, then proposed [79] an amendment to the second clause so it should read as follows:

> But if the person accused in such articles of impeachment shall be convicted by the votes of two-thirds of the members of such court present, the court shall proceed to ascertain what judgment shall be rendered in the case, which judgment, being rendered, shall be pronounced by the Presiding Officer, etc.

This was in view of the fact that the Constitution does not say that the punishment shall necessarily extend to disqualification to hold office. Mr. George F. Edmunds, of Vermont, suggested that the same result could be attained by striking out the words "of such court" and "by its Presiding Officer." Mr. VanWinkle accepted the amendment, which was agreed to without division.

Mr. George H. Williams, of Oregon, next proposed to insert after the words "impeachment shall not" the words "upon any of the articles be presented," and after the word "convicted" the words "upon any of said articles." [80]

The object of this amendment was to make it certain that a conviction on one article, as on one count of an indictment, should be sufficient for judgment, after the analogy of the criminal law. The amendment was agreed to without division.

So the rule received its present form.

2099. In 1804 the Senate, sitting as a high court of impeachment, considered and adopted rules for the trial.—On December 10, 1804,[81] the Senate, sitting as a high court of impeachment, took into consideration the report of the committee appointed on November 30 to prepare and report proper rules of proceedings, to be observed by the Senate in cases of impeachments.

This report consisted of a series of rules, prescribing forms and methods of procedure. On this day the high court agreed to a portion of the rules, and then postponed the consideration of the remainder.

On December 24 the high court resumed consideration of the report, and agreed to the remaining portion.

In the meanwhile, on December 14, action had been taken in accordance with the rules agreed to on December 10.

2100. Where the special rules for impeachment trials are silent, the general rules of the Senate are regarded as applicable.

At the Johnson trial the Chief Justice felt constrained to submit to the Senate for decision a question of order affecting the organization.

At the Johnson trial the Chief Justice ruled that one point of order might not be made while another was pending.

The Chief Justice ruled in the Johnson trial that debate must be confined to the pending question.

Rule XXIII, prohibiting debate in open Senate sitting for an impeachment trial, was held by the Chief Justice not to apply to a question arising during organization.

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[77] Senate Journal, pp. 868, 869.
[78] Senate Journal, pp. 939–951.
[79] Senate Journal, p. 243; Globe, p. 1587.
[80] Senate Journal, p. 243; Globe, pp. 1587, 1588.
[81] Second session, Eighth Congress, Senate Impeachment Journal, pp. 511.

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Instance of an appeal from the decision of the Chief Justice on a question of order arising during the Johnson trial.

In the Johnson trial the Chief Justice ruled that a proposed rule or order should lie over for one day.

On March 6, 1868,[82] while the Senate was organizing for the trial of Andrew Johnson, President of the United States, after the Chief Justice had taken the chair as presiding officer, and while the oath was being administered to the Senators, an objection was made to the competency of Mr. Benjamin F. Wade, of Ohio, to take the oath.

Discussion having arisen, Mr. Jacob M. Howard, of Michigan submitted a question of order.

The Chief Justice [83] said:

The Senator from Connecticut is called to order. The Senator from Michigan has submitted a point of order for the consideration of the body. During the proceedings for the organization of the Senate for the trial of an impeachment of the President the Chair regards the general rules of the Senate as applicable and that the Senate must determine for itself every question which arises, unless the Chair is permitted to determine it. In a case of this sort affecting so nearly the organization of this body the Chair feels himself constrained to submit the question of order to the Senate. Will the Senator from Michigan state his point of order in writing?

While the point of order raised by Mr. Howard was being reduced to writing at the desk, Mr. James Dixon, of Connecticut, submitted as a point of order whether a question of order such as was pending could be raised.

The Chief Justice said: [83a]

A point of order is already pending, and a second point of order can not be made until that is disposed of.

Mr. Howard's question was then submitted in writing, as follows:

That the objection raised to administering the oath to Mr. Wade is out of order, and that the motion of the Senator from Maryland, to postpone the administering of the oath to Mr. Wade until other Senators are sworn, is also out of order under the rules adopted by the Senate on the 2d of March, instant, and under the Constitution of the United States.

The Chief Justice announced that this question was open to debate.

Mr. Dixon having proceeded in debate, was discussing the competency of Mr. Wade to participate in the trial, when Mr. John Sherman, of Ohio, called him to order for not confining himself to the question under consideration.

Thereupon the Chief Justice held:

The Senator from Ohio makes the point of order that the Senator from Connecticut, in discussing the pending question of order, must continue himself strictly to that question, and not discuss the main question before the Senate. In that point of order the Chair conceives that the Senator from Ohio is correct, and that the Senator from Connecticut must confine himself strictly to the discussion of the point of order before the House.

Mr. Dixon having proceeded, was again called to order by Mr. Howard, who objected that no debate was in order under Rule XXIII of "the rules of procedure and practice in the Senate when sitting on impeachment trials." This rule he quoted as follows:

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[82] Second session Fortieth Congress, Senate Journal, pp. 810, 811; Globe, pp. 1696, 1697, 1698, 1700.

[83] Salmon P. Chase, of Ohio, Chief Justice.

[83a] Globe, p. 1697.

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All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, except when the doors be closed for deliberation, and in that case no Member shall speak, etc.

The Chief Justice overruled the point of order, saying:

The twenty-third rule is a rule for the proceedings of the Senate when organized for the trial of an impeachment. It is not yet organized; and in the opinion of the Chair the twenty-third rule does not apply at present.

Mr. Charles D. Drake, of Missouri, having appealed, the Chief Justice put the question:

As many Senators as are of opinion that the decision of the Chair shall stand as the judgment of the Senate will, when their names are called, answer "yea;" as many as are of the contrary opinion will answer "nay."

And there were yeas 24, nays 20; so the decision of the Chief Justice was sustained.

2101. On April 11, 1868,[84] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the Chief Justice,[85] in ruling on a question of order said:

The Chief Justice in conducting the business of the court adopts for his general guidance the rules of the Senate sitting in legislative session as far as they are applicable. That is the ground of his decision.

2102. On April 14, 1868,[86] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

Objection being made to the immediate consideration of the order, and Mr. Sumner having demanded its consideration, the Chief Justice [85] said:

The Chief Justice stated on Saturday that in conducting the business of the court he applied, as far as they were applicable, the general rules of the Senate. This has been done upon several occasions, and when objection has been made orders have been laid over to the next day for consideration.

2103. In the Johnson trial the Chief Justice admitted a motion to lay a pending proposition on the table.—On April 13, 1868,[87] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, an order relating to the final arguments in the trial, was under consideration.

Mr. George H. Williams, of Oregon, moved that the resolution lie on the table.

Mr. Charles D. Drake, of Missouri, said:

I raise a question of order, Mr. President, that in this Senate sitting for the trial of an impeachment there is no authority for moving to lay any proposition on the table. We must come to a direct vote, I think, one way or the other.

The Chief Justice [85] said:

The Chief Justice can not undertake to limit the Senate in respect to its mode of disposing of a question; and as the Senator from Oregon [Mr. Williams]

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[84] Second session Fortieth Congress, Globe Supplement, p. 147.
[85] Salmon P. Chase, of Ohio, Chief Justice.
[86] Second session Fortieth Congress, Senate Journal, p. 896; Globe Supplement, p. 174.
[87] Second session Fortieth Congress, Globe Supplement, p. 162.

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announced his purpose to test the sense of the Senate in regard to whether they will alter the rule at all the Chief Justice conceives his motion to be in order.

2104. Instance wherein a Senator sitting in an impeachment trial was excused from voting on an incidental question.—On May 15, 1876,[88] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the sufficiency of the pleadings. After the arguments had been concluded, but before the Senate had rendered a decision, Mr. James L. Alcorn, a Senator from Mississippi, attended and took the oath prescribed for Senators sitting in impeachment trials.

Having taken the oath, Mr. Alcorn rose and stated that he had been unavoidably absent from the sessions of the Senate sitting for the trial of impeachment heretofore held, and for that reason he asked to be excused from voting upon the question now under consideration presented by the pleadings.

Thereupon Mr. John Sherman moved that Mr. Alcorn, for the reasons stated, be excused from voting on the question as presented by the pleadings and now before the Senate.

The motion was agreed to.

2105. Instances of a call for a quorum in the Senate sitting for an impeachment trial.

The Presiding Officer of the Senate sitting in an impeachment trial directed the counting of the Senate to ascertain the presence of a quorum.

On April 22, 1868,[89] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the argument of Mr. Manager George S. Boutwell, the attendance after a recess was so scanty that Mr. John Sherman, of Ohio, moved a call of the Senate under the then existing Rule 16 of the Senate. The motion was carried and the roll was called.

2106. On May 4, 1876,[90] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Aaron A. Sargent, of California, commented on the fact that less than a quorum were presented, and moved a call of the Senate.

And thereupon the roll was called.

2107. On June 16, 1876,[91] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, of Vermont, suggested that there was no quorum present, and asked the President pro tempore to ascertain.

The President pro tempore [92] said:

The Secretary will count the Senate.

The Chief Clerk having counted the Senators present, the President pro tempore announced that the Senators present did not constitute a quorum.

Thereupon, on motion of Mr. Edmunds, the Sergeant-at-Arms was directed to request the attendance of absentees.

This having failed to secure sufficient attendance, the Senate thereupon adjourned.

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[88] First session Fortieth Congress, Senate Journal, p. 933; Record of trial, pp. 72, 73.
[89] Second session Forieth Congress, Senate Journal, p. 921; Globe Supplement, p. 274.
[90] First session Forty-fourth Congress, Record of trial, p. 31.
[91] First session Forty-fourth Congress, Senate Journal, p. 952; Record of trial, p. 171.
[92] T. W. Ferry, of Michigan, President pro tempore.

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2108. Instances of temporary suspensions of the sitting of the Senate in an impeachment trial.—On July 10, 1876,[93] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore [94] said:

The Chair is informed that there is a message to be submitted from the House of Representatives. If there is no objection the proceedings of the trial will be temporarily suspended for that purpose.

A message was received from the House of Representatives.

After which the President pro tempore said:

The Senate resumes its session sitting for the trial of the impeachment.

Later another message was received in the same way.[95]

2109. On July 19, 1876,[96] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Windom, a Senator from Minnesota, asked that the proceedings might be suspended in order that he might make a report from the committee of conference on the sundry civil bill.

The President pro tempore [97] said:

If there be no objection proceedings will be suspended for that purpose.

After some time spent in legislative session, the Senate resumed the trial of the impeachment of William W. Belknap.

2110. Admission to the Senate galleries during the Johnson trial was regulated by tickets.

The Senators occupied their usual seats during the Johnson trial.

On March 4, 1868,[98] Mr. Henry B. Anthony, of Rhode Island, during the proceedings preliminary to the trial of President Andrew Johnson, proposed the following:

Ordered, That during the trial of the impeachment now pending no person besides those who now have the privilege of the floor shall be admitted to the galleries, or to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms. Such tickets shall be numbered, and shall be good only for the day on which they are dated. The number of tickets issued shall not exceed the number of persons who can be comfortably seated in the galleries, leaving the steps and passages entirely free. The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and tickets of admission thereto shall be issued to the foreign legations. Four tickets shall be issued to each Senator, 2 tickets to each Member of the House of Representatives, 2 tickets to the Chief Justice and to each justice of the Supreme Court of the United States, 2 tickets to the chief justice and to each justice of the supreme court of the District of Columbia, and 2 tickets to the chief justice and to each judge of the Court of Claims. Sixty tickets shall be issued by the Presiding Officer to the reporters for the press, and the remaining tickets shall be distributed under his direction.

The Sergeant-at-Arms, under the direction of the Presiding Officer of the Senate, shall carry out these regulations, and, with the approbation of the Committee on Contingent Expenses, shall be authorized to employ such additional force as may be necessary for the preservation of order.

On March 6 [99] this proposition was referred to the select committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, and

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[93] First session Forty-fourth Congress, Record of trial, p. 230.
[94] T. W. Ferry, of Michigan, President pro tempore.
[95] Record of trial, p. 234.
[96] First session Forty-fourth Congress, Record of trial, p. 282.
[97] T. W. Ferry, of Michigan, President pro tempore.
[98] Second session Fortieth Congress, Senate Journal, pp. 258, 259, Globe, p. 1649.
[99] Senate Journal, p. 277; Globe, pp. 1701, 1702.

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which had in charge the forms of procedure and arrangements for the trial.

On March 10[1] Mr. Howard reported the order with amendment. There was considerable debate as to the propriety of making any rule, the argument being that the public should not be excluded. On the other hand it was urged that order and decorum during the trial were of great importance, and that there should be arrangements which would secure an audience disposed to preserve order.

Another question that was discussed at length was the provision for seating Senators. At the Humphries trial the Senators had occupied benches placed at the right and left of the presiding officer. Senators who had sat during those proceedings objected to such arrangement as uncomfortable and also as inconvenient because of difficulty in hearing. It was pointed out that the attendance of Members of the House was not likely to be large, as already in the preliminary proceedings not over fifty had attended at any one time. Finally, on motion of Mr. Anthony, an amendment was agreed to providing that the Senators should occupy their usual seats during the trial. The order as amended was agreed to as follows:

That during the trial of the impeachment now pending no persons besides those who have the privilege of the floor and clerks of the standing committees of the Senate shall be admitted to that portion of the Capitol set apart for the use of the Senate and its officers, except upon tickets to be issued by the Sergeant-at-Arms.

The number of tickets shall not exceed 1,000.

Tickets shall be numbered and dated, and be good only for the day on which they are dated.

The portion of the gallery set apart for the diplomatic corps shall be exclusively appropriated to it, and 40 tickets of admission thereto shall be issued to the Baron Gerolt for the foreign legations.

Four tickets shall be issued to each Senator, 4 tickets each to the Chief Justice of the United States and the Speaker of the House of Representatives, 2 tickets to each Member of the House of Representatives, 2 tickets each to the associate justices of the Supreme Court of the United States, 2 tickets each to the chief justice and associate justices of the supreme court of the District of Columbia, 2 tickets to the chief justice and each judge of the Court of Claims, 2 tickets to each Cabinet officer, 2 tickets to the General commanding the Army, 20 tickets to the Private Secretary of the President of the United States, for the use of the President, and 60 tickets shall be issued by the President pro tempore of the Senate to the reporters of the press. The residue of the tickets to be issued shall be distributed among the Members of the Senate in proportion to the representation of their respective States in the House of Representatives, and the seats now occupied by the Senators shall be reserved for them.

On March 24,[2] during the trial, Mr. John Sherman, of Ohio, proposed the following:

Ordered, That after to-morrow the order of the 15th of March ultimo, relative to admission to the gallery, be suspended until further order, and that the Sergeant-at-Arms of the Senate shall take special care that order shall be observed in the galleries during the trial of the impeachment now pending, and he is hereby authorized to arrest and bring before the Senate any person who violates the orders of the Senate, and he shall take effective measures to secure admission to the diplomatic gallery, the ladies' gallery, and the reporters' gallery to those only who are entitled to admission thereto under the rules.

On April 2[3] the resolution was debated briefly. Mr. Sherman intimated that the audiences had not been very orderly, and that the people who would attend with open galleries would do as well.

[1] Senate Journal, p. 288; Globe, pp. 1775–1782.
[2] Senate Journal, p. 336; Globe, p. 2078.
[3] Senate Journal, p. 364; Globe, p. 2233.

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On April 4 [4] the proposition was debated, principally as to the conduct of the audiences, but was not acted on and apparently did not come before the Senate again.

On May 5 [5] a proposition to give seats in the gallery to the members of the United States Medical Association was discouraged in debate, and did not come to a vote, it being urged that they could seek admission by tickets in the usual way.

2111. According to the best considered practice, the Senate sitting for an impeachment trial does not obtain the use of Senate archives without an order made in legislative session.—On April 4, 1868,[6] in the Senate sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the production of testimony on behalf of the House of Representatives, asked that the Executive Journal of the Senate for a cretain date might be produced, and he asked that the Senate direct its production.

Mr. John Sherman, of Ohio, a Senator, moved that the Journal be furnished.

The motion was agreed to.

2112. On April 15, 1868,[7] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, moved for an order on the proper officer of the Senate to furnish a statement of the dates of the beginning and end of each session of the Senate.

The Chief Justice [8] said:

The Chief Justice is of opinion that that is an application which can only be addressed to the Senate in legislative session. If the court desire it, he will vacate the chair in order that the President pro tempore may take it.

Very soon thereafter, on motion of Mr. Reverdy Johnson, of Maryland, "the Senate sitting for the trial of the President upon articles of impeachment adjourned to 12 o'clock m. to-morrow."

Thereupon the President pro tempore resumed the Chair, and in the course of legislative business, on motion of Mr. Johnson, it was:

***Order*, That the Secretary of the Senate be directed to furnish to the counsel for the President a statement of the beginning and end of each executive and legislative session from 1789 to 1868.**

2113. During the trial of President Johnson the Senate voted to receive resolutions of a State constitutional convention on the subject of the impeachment.—On March 25, 1868,[9] while proceedings for the impeachment of President Johnson were going on before the Senate, the President pro tempore [10] laid before the Senate resolutions adopted by the constitutional convention of North Carolina, returning thanks for the vigilance with which the House and Senate had proceeded in the matter of impeachment.

Mr. Willard Saulsbury, of Delaware, said:

I object, Mr. President, to the reception of that paper, and for this reason: It purports to be addressed to the Senate of the United States, and the Members

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[4] Senate Journal, p. 366; Globe, pp. 2237, 2238.
[5] Globe, p. 2362.
[6] Second session Fortieth Congress, Globe Supplement, p. 119.
[7] Second session Fortieth Congress, Senate Journal, pp. 383, 901; Globe Supplement, p. 194.
[8] Salmon P. Chase, of Ohio, Chief Justice.
[9] Second session Fortieth Congress, Senate Journal, p. 337; Globe, p. 2084.
[10] Benj. F. Wade, of Ohio, President pro tempore.

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of the Senate of the United States compose the court of impeachment, and any communication addressed to the Members of that court upon the pending subject is improper to be entertained by the Senate, the Senate composing that court, as being an attempt to exercise an influence upon the minds of the judges.

The President pro tempore put the question on the reception of the resolutions, and the Senate voted to receive them.

The resolutions were then laid on the table.

2114. In the Swayne trial a Senator who had not heard the evidence was excused from voting on the question of guilt.—On February 27, 1905,[11] in the Senate sitting for the impeachment trial of Judge Charles Swayne, as the vote was about to be taken on the first article, Mr. P. C. Knox, of Pennsylvania, said:

Mr. President, having been prevented by illness from attending the sessions of the Senate sitting in this impeachment trial at which the testimony was produced, and also having been prevented by the effects of the illness from reading the testimony, I ask that the Senate may excuse me from voting upon this and all subsequent roll calls taken to ascertain the judgment of the Senate upon the charges against the respondent.

The Presiding Officer said:

Senators, you have heard the request of the Senator from Pennsylvania [Mr. Knox]. Those who would excuse him from voting will say "aye;" opposed, "no." [Putting the question.] The "ayes" have it. The Senator from Pennsylvania is excused.

2115. The expenses of the Senate in the Swayne trial was defrayed from the Treasury.—On January 24, 1905,[12] the Senate, in legislative session, agreed to this resolution:

Resolved, etc., That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $40,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Charles Swayne.

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[11] Third session Fifty-eighth Congress, Senate Record, p. 3468.
[12] Third session Fifty-eighth Congress, Record, p. 1289; 33 Stat. L., p. 1280.

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Conduct of Impeachment Trials* [1]

1. Appearance of respondent. Sections 2116–2118.
2. Form of summons. Section 2119.[2]
3. Answer of respondent, replication, etc. Sections 2120–2125.[3]
4. Presentation of articles. Sections 2126, 2127.[4]
5. Return on summons. Sections 2128, 2129.
6. Counsel and motions. Sections 2130, 2131.
7. Opening and final arguments. Sections 2132–2143.[5]
8. Conduct and privilege of managers and counsel. Sections 2144–2154.

2116. Under the parliamentary law, if the party impeached at the bar of the Lords do not appear, proclamations are issued giving him a day to appear.

Provisions for rectification of an error in the process to secure attendance of respondent impeached by the Commons.

The party impeached at the bar of the Lords not appearing, his goods may be arrested and they may proceed.

In Chapter LIII of Jefferson's Manual, the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

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

2117. In the English usage the articles of impeachment are substituted for an indictment and distinguished from it by less particularity of specification.—In Chapter LIII of Jefferson's Manual the following is given in the sketch of some of the principles and practices of England" on the subject of impeachments:

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

*Hinds' Precedents, Vol. 3, p. 438 (1907).

[1] Other procedure illustrated by the conduct of the several trials relates to the following subjects: Delivery of the impeachment at the bar of the Senate. Sections 2296, 2320, 2343, 2367, 2385, 2412, 2413, 2445, 2505 of this volume. Drawing of articles. Sections 2297, 2299, 2300, 2323, 2343, 2344, 2368, 2387, 2412, 2415, 2416, 2418, 2444, 2448, 2472, 2506, 2514. Form of articles in the following cases: Blount's (sec. 2302), Pickering's (sec. 2328), Chase's (sec. 2346), Peck's (sec. 2370), Humphrey's (sec. 2390), Johnson's (sec. 2420), Belknap's (sec. 2449), Swayne (sec. 2476). Organization for trial. Section 2328, 2349. As to postponement of trial. Sections 2044, 2353, 2425, 2426, 2430, 2456. Questions by Senators during testimony. Sections 2176–2183.

[2] Issuance of writ of summons. Sections 2304, 2307, 2322, 2329, 2347, 2391, 2423, 2451, 2479.

[3] Appearance and answer. Sections 2307–2310, 2332, 2333, 2340, 2351, 2371, 2374, 2392, 2393, 2424, 2428, 2431, 2452, 2453, 2461, 2480, 2481. The replication. Sections 2311, 2352, 2375, 2431, 2432, 2454, 2482. Managers file a brief on respondent's plea to jurisdiction. Section 2015.

[4] Presentation of articles in the Senate. Sections 2301, 2325, 2328, 2346, 2370, 2390, 2420, 2449, 2473, 2476. As to presentation of before the Chief Justice takes his seat as presiding officer. Section 2057. Precedent in Blount's case. Section 2295.

[5] See also Sections 2312, 2326, 2355, 2378, 2433, 2434, 2456, 2458, 2464, 2465, 2484. As to admission of evidence during final arguments. Section 2166.

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2118. Articles of impeachment being presented against a Senator, he was sequestered from his seat and was ordered to and did recognize for his appearance.

Form of recognizance given by the respondent in an impeachment case for his appearance.

The Senate Journal included in full the bond given by a respondent for his appearance to answer articles of impeachment.

On July 7, 1797,[6] when articles of impeachment from the House of Representatives were exhibited in the Senate against William Blount, a Senator, it was ordered that he be sequestered from his seat and enter into recognizance for his appearance to answer said impeachment.

Mr. Blount thereupon named his sureties, who were satisfactory to the Senate, and the recognizance was approved by the Senate and executed in its presence as follows:

Be it remembered, That on the 7th day of July, in the year of our Lord 1797, personally appeared before the President pro tempore and Senate of the United States William Blount, esq., Senator of the State of Tennessee; Thomas Blount, esq., Member of the House of Representatives of the United States from the State of North Carolina, and Pierce Butler, esq., of South Carolina, who severally acknowledged themselves to owe to the United States of America the following sums, that is to say: The said William Blount the sum of $20,000, and the said Thomas Blount and Pierce Butler each the sum of $15,000, to be levied on their respective goods and chattels, lands, and tenements, on the condition following, that is to say:

The condition of the foregoing recognizance is such that if the said William Blount shall appear before the Senate of the United States to answer to certain charges of impeachment to be exhibited against him by the House of Representatives of the United States, and not depart therefrom without leave, that then the above recognizance shall cease to exist, otherwise be and remain in full force and virtue.

Sealed and delivered in Senate of the United States this 7th day of July, 1797.

WILLIAM BLOUNT. [L. S.]
THOMAS BLOUNT. [L. S.]
PIERCE BUTLER. [L. S.]

Attest:
SAMUEL A. OTIS,
Secretary of the Senate of the United States.

This bond appears in full in the Senate Journal.

2119. Form of writ of summons issued to respondent in an impeachment case.

Form of precept indorsed on writ of summons in an impeachment case.

All processes in an impeachment trial are served by the Sergeant-at-Arms of the Senate unless otherwise ordered.

Rule XXIV of the "Rules of procedure and practice of the Senate when sitting in impeachment trials" provides:

FORM OF SUMMONS TO BE ISSUED AND SERVED UPON THE PERSON IMPEACHED

THE UNITED STATES OF AMERICA, *ss:*
The Senate of the United States to ——— ———, *greeting:*

Whereas the House of Representatives of the United States of America did, on the ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ——— ———, in the words following:

[6] First session Fifth Congress, Senate Journal, p. 389.

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[Here insert the articles.]

And demand that you, the said ——— ———, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice;

You, the said ——— ———, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the —— day of ———, at 12:30 o'clock p. m., then and there to answer to the said articles of impeachment, and then there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness ——— ———, and [Presiding Officer of the said Senate], at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———.

Presiding Officer of the Senate.

FORM OF PRECEPT TO BE INDORSED ON SAID WRIT OF SUMMONS.

THE UNITED STATES OF AMERICA, *ss:*

The Senate of the United States to ——— ———, *greeting:*

You are hereby commanded to deliver to and leave with ——— ———, if conveniently to be found, or, if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least —— days before the appearance day mentioned in said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,

Presiding Officer of the Senate.

All process shall be served by the Sergeant-at-Arms of the Senate, unless otherwise ordered by the court.

This is the form agreed to in 1868.[7]

2120. Under the parliamentary law the respondent answers the summons in custody if the case be capital and the accusation by special, but not if it be general.

The accusation being of misdemeanor only, the respondent, under the English usage, does not answer the summons in custody, but the Lords may commit him until he finds sureties for his future appearance.

Under the parliamentary law the respondent, if a Lord, answers the summons in his place; if a Commoner, at the bar.

Under the English practice a copy of the articles is furnished to the respondent and a day is fixed for his answer.

According to the parliamentary law the respondent, on accusation for misdemeanor, may answer the articles by person or by writing or by attorney.

A respondent in a case of impeachment for misdemeanor answers the articles before the Lords in such a state of liberty or restraint as he was in when the Commons complained of him.

[7] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

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In English impeachments the respondent has counsel in accusation for misdemeanor, but not in capital cases.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

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

2121. Under the parliamentary law the answer of the respondent to impeachment need not observe the great strictness of form.

The respondent in an impeachment case may not, under the English law, plead in his answer a pardon as bar to the impeachment.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Answer. The answer need not observe great strictness of form. He may plead guilty as to part and defend as to the residue; or, saving all exceptions, deny the whole, or give a particular answer to each article separately. (1 Rush., 274; 2 Rush., 1374; 12 Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643: 2 Wood., 607.) But he can not plead a pardon in bar to the impeachment. (2 Wood., 615; 2 St. Tr., 735.)

2122. Under the parliamentary law of impeachments the pleadings may include a replication, rejoinder, etc.—In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England" on the subject of impeachments:

Replication, rejoinder, etc. There may be a replication, rejoinder, etc. (Seld. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. House of Commons, 6 March, 1640–41.)

2123. The pleadings were the subject of full discussion during the Belknap trial.

The extent of dilatory pleadings in the Belknap trial was commented on as an innovation on American and English precedents.

In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles.

The articles of impeachment in the Belknap case were held sufficient although attacked for not describing the respondent as one subject to impeachment.

The Senate having assumed jurisdiction in the Belknap impeachment, declined to permit the respondent to plead further, but gave leave to answer the articles.

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On May 4, 1876,[8] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the President pro tempore announced that the Senate had adopted the following:

That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amendable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such arguments discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

As to the second question referred to, Mr. Matt H. Carpenter, of counsel for the respondent, summarized thus:[9]

Briefly, the attitude of the case is this:

The articles of impeachment charge that the respondent, Belknap, was at one time Secretary of War, and while holding that office did certain things which are declared by said articles to be high crimes and misdemeanors.

The respondent pleads to the jurisdiction of the court that when this proceeding was commenced he was not an officer of the United States, but was a private citizen.

The first replication avers that he was Secretary of War when he committed the acts complained of, and the respondent has demurred.

A second replication by the House charges that after the acts were committed the House had commenced an investigation, with a view to impeachment, and that the respondent with full knowledge of the fact resigned his office, with intent to evade impeachment. This replication has closed in issues of fact which are pending for trial.

The court has ordered an argument in regard to the sufficiency of the plea in abatement, the materiality of the issues of fact, and also whether the House can support the jurisdiction by matters alleged in subsequent pleadings, but not alleged in the articles of impeachment.

Mr. Manager Scott Lord summarized[10] more at length:

For the proper consideration of these questions it is expedient that at this stage of the case I call your attention precisely to what the issues are. I do not intend to read the pleadings in full, but only such parts of them as may be necessary for the understanding of this point. Article 1 presents as follows:

"That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War as aforesaid, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States that said Belknap, as Secretary of War as aforesaid on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post.

* * * * * * *

"That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter to wit, on or about the 17th day of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary

[8] First session Forty-fourth Congress, Senate Journal, p. 928; Record of trial, p. 27.
[9] Record of trial, p. 37.
[10] Pages 31, 32.

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of War as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of $1,500 in consideration of the appointment of said John S. Evans by him, the said Belknap, as Secretary of War as aforesaid, and in consideration of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time."

Then in article 3:

"Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said miltary post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

"Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office."

The defendant in this case answered to these articles:

"And the said William W. Belknap, etc., says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

The House of Representatives duly adopted and filed a general and special replication. A part of the latter is as follows:

"The House of Representatives of the United States say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A.D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

"And the House of Representatives further say that while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March, A.D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A.D. 1876."

To this replication the defendant rejoins, among other things, that the—

"Chairman of said committee then declared to said Belknap that he, said Clymer, should move in the said House of Representatives, upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A.D. 1876; and said Belknap regarding this statement of said Clymer, chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid."

There is a joinder in demurrer and a surrejoinder by the House of Representatives, a portion of which surrejoinder I will read:

"And the said House of Representatives, as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like."

Now, I call the attention of this court to the fact that in regard to two of the allegations made in the second replication by the House the defendant tendered

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issues and the House of Representatives joined in such issues, and I shall argue to this court and produce authorities presently to show that the defendant, having thus tendered issues joined in by the House, he can not go behind them, and can not question the right of this tribunal to hear and determine the matters thus brought before it.

Then there are four special rejoinders which the defendant made. One of them I have read to this court. In regard to each of the other three not read, the House of Representatives tendered an issue to be tried by this court; and what does the defendant do? Does he say that these matters are improperly before this court? Does he say that any injury will result to him in having these facts fully and fairly and truthfully investigated by this tribunal? Not at all. So far from it, with great formality he tenders a similiter in the following words:

"And the said Belknap, as surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like."

We say that they are estopped upon every principle known to legal proceedings, known to the trial of cases in court, from attempting now to evade these issues. It was very proper on the part of this tribunal to raise this question, if it saw fit, but I apprehend, when the authorities are reviewed upon this point it will be seen that it was too late for anybody to raise this question. Of course any question involving the jurisdiction of this court may be raised at any time; but on questions which do not involve its jurisdiction, but only facts pertaining thereto, no matter in what form of pleading these facts get before it, it is too late, when both parties have so tendered issues to be tried by this tribunal, for the defendant or for any member of this court to prevent such trial; and this I shall show abundantly by the authorities. If otherwise this tribunal, the most august in the land, supposed above all others capable of reaching to the direct truth regardless of forms and ceremonies, has not the power of a court of a justice of the peace; for I affirm that on the other side not one authority can be found, in the whole range of authorities, showing that when issues are joined on questions of fact before the most inferior court it has not the power to try and determine them; and therefore the question amounts to this: Has this tribunal less authority than the most inferior court in the United States or in any other land?

The first authority I introduce upon this point affirms this doctrine, that the plaintiff in his replication may introduce new matter to fortify his declaration. Now what is the question before this court? The very resolution gives us the victory in this regard; it assumes that such facts are in aid of a pertinent question before this court in support of its jurisdiction. I admit we could allege no new offense in this way; we could tender no new or distinct issue upon the merits as to the crime or misdemeanor which this defendant committed; but the question which he raises is a dilatory one, it is not one relating at all to his guilt or his innocence. It is a question of jurisdiction. He raises that question and affirms certain facts relating thereto; and we, in aid of that jurisdiction, bring in certain other facts relating thereto. This is the true statement of the case; we did what we have done in aid of the jurisdiction, and this the pleader may always do.

After the citation of various authorities, Mr. Manager Lord continued:[11]

I call the attention of the court now to the report of a committee of the British House of Commons, a learned and intelligent committee, a committee which has made a report that will go down with the ages, and I apprehend be received as the law on this subject so long as civilization exists. I call attention to Burke's Works, seventh volume, page 490, where the committee consider the "rules of pleading in courts of impeachment." I never have heard yet of any rule as to pleadings in a criminal court besides the indictment and the plea. Sometimes a defendant puts in what we call a special plea. If a question of jurisdiction is raised it is usually raised ore tenus. But what are the rules of pleading in this court? Such committee say:

"Your committee do not find that any rules of pleading, as observed in the inferior courts, have ever obtained in the proceedings of the high court of Parliament, in a cause or matter in which the whole procedure has been within their

[11] Page 33.

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original jurisdiction. Nor does your committee find that any demurrer or exception as of false or erroneous pleading hath been ever admitted to any impeachment in Parliament as not coming within the form of the pleading."

The members of this court know the distinguished character of Mr. Walpole not only as a lawyer but as a statesman.

Mr. Walpole said——

Page 497——

"Those learned gentlemen (Lord Wintoun's counsel) seem to forget in what court they are. They have taken up so much of your lordship's time in quoting of authorities and using arguments to show your lordships what would quash an indictment in the court below that they seem to forget they are now in a court of Parliament and on an impeachment of the Commons of Great Britain."

And page 501——

"A great writer on the criminal law, Justice Foster, in one of his discourses, fully recognizes those principles for which your managers have contended, and which have to this time been uniformly observed in Parliament. In a very elaborate reasoning on the case of a trial in Parliament (the trial of those who had murdered Edward the II) he observes this: 'It is well known that in parliamentary proceedings of this kind it is, and ever was, sufficient that matters appear with proper light and certainly to a common understanding, without that minute exactness which is required in criminal proceedings in Westminister Hall. In these cases the rule has always been loquendum et vulgus."

We say, therefore, if the articles are defective and the second replication not of strict right, all is cured by rejoinder, surrejoinder, and similiter. And in regard to the main question presented by the second replication—not the most conclusive question perhaps, but it may be called the main question of the second replication—namely, whether this defendant has the right to evade the Constitution and defeat its operations by his own will, he confesses and avoids. He admits on the record that he resigned for the purpose of evading this impeachment. It is true he says he was not guilty, and resigned for other purposes; but that is utterly immaterial to this question, because he does admit, I repeat, that he resigned for the purpose of defeating this impeachment.

I will not stop, Senators, to answer the suggestion of counsel that the chairman of that committee had the right, in behalf of this nation, and in behalf of the House if Representatives of the United States of America, to make a contract with the defendant that if he would get out of the office of Secretary of War before a certain hour he should not be impeached for these high crimes and misdemenaors, which, if these articles are true, had polluted him for years, and made him of all men that have ever appeared in a court of impeachment the most unfit to hold civil office. I deny such a right. I am astonished that counsel of respectability and of high standing should stand in this court and assume for a moment that the chairman of a committee had a right to make any such infamous contract; but that is one of the issues. I was surprised the more to hear it stated here, because it is one of the issues. The allegation of such agreement we absolutely deny; we deny that any such contract was made. By our surrejoinder we tender an issue upon that question, and it is accepted by the other side by filing their similiter.

Reference has been made also to the fact that the Constitution leaves the defendant subject to an indictment, and that an indictment may be found against him. The two proceedings, Senators, are entirely and absolutely distinct. One has nothing to do with the other, for the statute to which the counsel referred (sec. 1781 of the Revised Statutes) does not pretend to change the law or rules of impeachment.

Now I wish to call the attention of this tribunal to another consideration, and that is that on this question you are not to give the defendant the benefit of any of those rules which are provided for criminal cases. Assuming, for the sake of the argument, that he is accused as a criminal, and that this proceeding is a criminal proceeding, so that when we get to the merits he may say that he is entitled to the presumption of innocence, that he is entitled to be defended by counsel—and certainly he has illustrious counsel—that he would be entitled to the right of challenge before a jury, and is entitled to confront the witnesses: assuming that this was an indictment and he was before one of the courts of the land and should stand up and claim all these privileges, they of course would be given to him, and we do not care about challenging them here. For the sake of the argument, we admit that here upon the merits he has all these privileges, so far as applicable in this court. What I say is that on this question of jurisdic-

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tion he has no such privilege; on the contrary, he has not as many privileges, as the authorities will show, as he would have in a civil action.

This is not one of the questions over which the law watches with such jealousy to guard the rights of a defendant. So long as it is true that no case of fact can be made, no evidence can be offered under which speculation may not peer: so long as it is true that sometimes innocent men suffer; so long as that maxim exists in our law that it is better that ninety-nine guilty men go free than that one innocent man suffer, the common law will allow a person accused of crime the presumption and privileges we have referred to. But what these questions to do with a mere abstract question of law? The question now presented to you has nothing to do with his guilt or innocence; it has nothing to do with his imprisonment; it has nothing to do with any question personal to himself. It is purely a legal one, and must be considered precisely as though it arose in a civil action, excepting, as before suggested, that he has not all the privileges in this regard that he would have in a civil action. When a defendant in a criminal action raises a dilatory plea it does not receive the consideration which it does in a civil action.

What is the object in pleading in criminal actions? Allow me to call the attention of the court to 2 Archbold's Criminal Practice and Pleadings, sixth edition, volume 2, page 206:

"The object of pleading, whether in civil or criminal actions, is to inform the parties of the facts alleged by each against the other with such clearness and distinctness as to eable them to prepare for the trial of disputed facts or for the application of the law to those which are admitted. In its application to criminal cases it is a statement of crime imputed to the prisoner with such a particularly of circumstances only as will enable him to understand the charge and prepare for his defense, and as will authorize the court to give appropriate judgment upon conviction."

At common law a defendant in a criminal action was not allowed to plead in abatement as in civil action (1 Archold, p. 110; Barber's Criminal Law, p. 343), and can not tender a bill of exception. (Garbett's Criminal Law, vol. 2, p. 521.) Therefore you see, Senators, that while the law has always been watchful to protect life and liberty, intending that no innocent man should be falsely accused of crime, yet in regard to the surroundings of the case, in regard to the mere question of pleadings, he has certainly had no more privilege, and certainly has now no more privilege, than in a civil action.

Mr. Montgomery Blair, of counsel for the respondent, said: [12]

I pass now to the second branch of the question presented by the order of the Senate, and that is on the materiality of the allegations of the second replication and of our rejoinder. We did not regard the replication as tendering a material issue, and for that reason we might, and perhaps ought to have, demurred; but having, as we believed, a conclusive answer to it in the rejoinder which we made, we chose that course, preferring that in this maneuvering for position—that is all it amounts to—our friends on the other side should not have the advantage of us.

It needs no argument to show that if only persons holding office are amenable to impeachment it must be charged in the articles that they hold office; and describing the defendant as "late Secretary of War" does not bring him within the description of persons given in the Constitution as amenable to impeachment. It would not be sufficient for them to have alleged that "the defendant does not now hold office, but was an officer at one time, and resigned in order to avoid impeachment." That would not have been sufficient certainly, for, if so, an ordinary court of justice might entertain jurisdiction of a person who had not been served with process upon an allegation that the defendant, hearing that it was intended to serve process upon him, had incontinently taken himself out of the jurisdiction of the court. There is no imaginable difference between the cases. We heard that they intended to impeach us, and, as the Constitution limited the prosecution to persons in office, we stepped over the line, just as a citizen of the United States who happens to be in New York, and learns that somebody there wants to serve him with a writ, betakes himself to New Jersey.

A man has a right to avoid lawsuits. The defendant here had a right, however innocent he might have been, to avoid the ruin which the law-books tell him attend invariably the prosecution of a private person by this overwhelming

[12] Page 31.

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power. No sensible man, unless he had ample means, would undertake a conflict of that sort if he could avoid it and character enough to stand before the country to justify his action. But the Supreme Court of the United States have settled again and again an analogous question that a man residing in one State may convey his property to persons outside of it to give a court jurisdiction, provided he does it in good faith. That principle was decided in the case of McDonald *v.* Smalley (1 Peters, 120); also Smith *v.* Kernochen (7 Howard, 198); Jones *v.* Lee (18 Howard, 76); Briggs *v.* French (2 Sumner, 252).

The court also holds in those cases that a man may change his residence from a State in order to assert his title to property within that State in the Federal courts against persons holding it adversely provided he changes his residence in good faith. Does anybody doubt that we resigned in good faith? Does anybody suppose or suspect that the defendant's was a colorable resignation; that he is to be restored to office when this prosecution ceases? Certainly not. And therefore the case corresponds entirely in principle to the decision I have cited. If jurisdiction may be obtained by the voluntary act of a party done in good faith, no reason can be suggested why a jurisdiction may not be avoided by a voluntary act done also in good faith. We were inclined to demur to the original pleading, and the original pleading is defective in the point that I have already brought to the attention of the court in not describing this defendant as one subject to impeachment, and in describing him in fact as a person who is not subject to impeachment, because it says that he was "late Secretary of War."

On the third question which is presented for consideration by the order of the Senate I think little need be said. They can not amend their articles by a new assignment in a replication. Nobody ever heard of an amendment of an indictment; and I may add that the court in the case of Barnard held that articles of impeachment were not amendable. I could, by looking over the books, perhaps find some accidental decision of a refusal of a court to allow an indictment to be amended. Indictments are quashed for defects which could be amended at any stage of a civil action as of course, and a new indictment must be found before further proceedings can be had. This, with the decision in the case of Barnard, at page 192, volume 1, that there could be no amendment of articles of impeachment, will dispose of the question suggested by the order of the Senate as to whether a necessary allegation not made in the articles could be supplied in the subsequent pleadings.

Mr. Matt. H. Carpenter, also of counsel for respondent, said: [13]

This court can only acquire jurisdiction, in a proceeding of impeachment, by articles presented by the House, showing a case of impeachable criminality; that is, a case where the act complained of is impeachable, and the actor subject to impeachment. In other words, the articles must be such as to require no aid from subsequent pleadings. In this case the articles describe the respondent as "late Secretary of War." Within the strictness of allegation required by common law criminal courts such descriptio personæ would not be equivalent to an allegation that he was no longer in that office. Therefore, and to meet the view sometimes entertained that a citizen holding one office may be impeached for misconduct in another, we interposed the plea to the jurisdiction, stating affirmatively that at the time of impeachment the respondent was not any officer of the United States. He was impeached at the bar of the Senate—if formal announcement that articles would be presented against him is an impeachment—on the 2d day of March, A.D. 1876. Some of the articles charge that he continued to be Secretary of War to or until (I forget which) the 2d day of March. This excludes the 2d day of March from his holding office; therefore, if we are right in contending that only a person holding office can be impeached, the articles fail to show a case within jurisdiction.

And I think it would have been safe for us to demur to the articles. But not wishing to take risks upon a technical construction, we thought it safer to plead affirmatively the fact that the respondent was not holding any office at the time of impeachment. Undoubtedly, to any plea of the respondent in confession and avoidance of the articles, the prosecution might have relied in confession and avoidance; but not so to a plea which, in substance, is denial of any fact which should have been stated in the articles, to show jurisdiction. If the articles themselves are deficient in not stating any fact necessary to entire jurisdiction—jurisdiction of the offense and the offender—then this court never acquired jurisdiction.

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[13] Page 45.

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It results from the fact that this court has only a special jurisdiction, that the first pleading must show a case within the jurisdiction. This was held with regard to jurisdiction of circuit courts of the United States in Brown *v.* Keene (8 Peters, 112); Jackson *v.* Ashton (8 Peters, 148); Hodgson *v.* Bowerbank (5 Cranch, 303); Mossman *v.* Higginson (4 Dallas, 12), and Jackson *v.* Twentyman (2 Peters 136).

The honorable manager [Mr. Lord] yesterday referred us to two cases—2 Chitty's Reports, 367, and 2 Maule & Selwyn, 75. These were actions of quo warranto—that is, civil suits to try the title to an office, to be followed by a judgment for damages and costs. The court held, what everybody would concede, that resignation did not preclude final judgment.

One Senator at least—Senator Howe—will remember a somewhat remarkable case of this kind in our own State, where he happened to be on the winning and myself on the losing side. I refer to the case State on the relation of Bashford *v.* Barstow. In this case, after the court had declared its jurisdiction, the attorney-general came into court and filed a discontinuance.

But the court held that the case was really a civil cause, in favor of the relator, against Barstow, who was in possession of the office; that the State had no interest in the question, and was only a formal party.

The learned manager also asserted that in a criminal cause there could be no such thing as a replication and rejoinder. If he will take the trouble to examine Wentworth's Pleadings he will find that he is in error; and if he will examine Archbold's Criminal Pleadings he will find the very forms from which we have drawn our pleadings subsequent to the plea in abatement.

On May 20 [14] the Senate, after several days of deliberation, agreed to these resolutions, the first by a vote of yeas 37, nays 29, and the second by a vote of yeas 35, nays 22.

1. *Resolved*, That in the opinion of the Senate, William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

2. *Resolved*, That at the time specified in the foregoing resolution [fixing the time for delivering this judgment] the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and it being the opinion of the Senate that said plea is insufficient in law, and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught, which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid."

On June 1,[15] after the announcement of the decision, Mr. Matt H. Carpenter, of counsel for the respondent, commented on the effect of the findings:

The defendant first pleaded to the jurisdiction of this court. The managers filed a replication, to which the respondent demurred; and the managers joined in the demurrer.

The rule is that each pleading must answer the preceding one. The replication, if sufficient in law, was a valid answer to the plea. The validity of the replication in matter of law was put in issue by our demurrer. And had the court upon the demurrer held the replication bad, then the court would have looked back to the plea itself to see whether or not it was sufficient in law; and if it had found the plea to be bad, then the court would have held in favor of the prosecution; upon the principle that a bad replication is as good as the bad plea to which it is a response. But in this case the court overruled our demurrer to the replication, thus holding the replication a sufficient answer to the plea. Was there therefore any necessity for the court to go back through the record and pass upon the sufficiency of prior pleadings? The plea to the jurisdiction having been answered by a replication which the court held good by overruling our demurrer to it, what was the necessity for the court to go back through the record? The only

[14] Senate Journal, pp. 944–947; Record of trial, p. 76.
[15] Record of trial, pp. 159, 160, 163.

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question raised by the plea was the jurisdiction of this court over the respondent; and whether or not the prosecution was entitled to a final judgment, or whether the judgment should be respondeat ouster, is a question to be examined.

But I submit with great confidence that the question of sufficiency in law of the articles of impeachment was not before the court; and that after judgment upon the question of jurisdiction, of respondeat ouster, the respondent was at liberty to begin his defense, as he might have done without questioning the jurisdiction.

In case on indictment, when the defendant challenges the jurisdiction of the court, and fails to make good his objection, he is remitted to every privilege he would have possessed if he had commenced his defense with questioning the jurisdiction; that is, he may move to quash, or he may plead in bar, or plead the general issue.

If I were compelled alone to take the responsibility in this case I should plead no further, but leave the managers to their own course; and in that case would not the managers be entitled to move for final judgment? This would be so, I think, had the issue been one of fact only. But here there was an issue of law and several issues of fact, all of which the court has disposed of by the order just entered.

We have appeared and pleaded, and if the court have held our defense insufficient, may we not stand upon it, without filing further pleadings? My impression is that the next step to be taken is for the managers to move for judgment, after which we could move for leave to plead further, which I have no doubt the court would grant.

All this, of course, is upon the supposition that the court has overruled the plea to the jurisdiction. The order declaring the jurisdiction was not concurred in by two-thirds of the Senators present. That is, less than two-thirds of the Senate think there is jurisdiction to convict the respondent.

Manifestly a court which has not jurisdiction to convict has no jurisdiction to try the respondent; and such pretended trial would be wholly extrajudicial. No witness could be indicted for false swearing at such trial, nor punished for contempt for not obeying a subpoena.

It therefore becomes a very important question to be settled by the respondent's counsel, whether any, and if any what, further steps should be taken on the part of the respondent. An order has been entered in the record, as an order of the court, overruling the plea to the jurisdiction. But the journal of the proceedings shows that thirty-five Senators concurred in the order, and twenty-two dissented.

Speaking for myself only (not having consulted with my colleagues), I maintain that upon the whole record the order is void, for the reason that it was not concurred in by two-thirds of the Senators.

Mr. Manager Scott Lord said:

One question which the learned counsel has discussed before you the managers do not feel authoried to discuss while the order of this Senate remains. By its order the demurrer to the replication of the House of Representatives is overruled, the plea of the defendant is overruled and held for naught, and the article of impeachment are held sufficient. Now, apprehending that this order has been made upon due consideration, that the Senators understood all these pleadings and made this order in that view, we do not feel called upon, I repeat, to discuss the questions pertaining thereto until some motion is made to change the order: and if such a motion should be made, if the Senate, after this deliberation and after this carefully prepared order, takes into consideration the question whether it will change its order, then the managers will desire to be heard.

And on June 6,[16] when the Senate was determining the length of time to be allowed to the respondent to answer on the merits, Mr. Manager William P. Lynde said:

We have already been occupied for several weeks with dilatory pleadings. We have had a plea to the jurisdiction of the Senate. It has been suggested by the counsel for the respondent that they would yet demur, or ask leave of the Senate to demur, to the articles of impeachment. The managers believe that these dilatory pleadings have been indulged in by this Senate quite too long and without a precedent. I find no precedent either in England or in this country for dilatory

[16] Record of trial, p. 163.

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pleadings on impeachment. In the first case tried under our Constitution against Senator Blount, it is true, the respondent filed a plea to the jurisdiction which is regarded as a dilatory pleading; but that was without authority and without precedent. There never had been a case in England where a plea of that kind had been allowed to be put into articles of impeachment, and it stands alone in this country.

The time which has already been occupied in this case must satisfy the Senate that it is not right that these dilatory pleadings should be introduced or allowed. In the case of Judge Barnard in New York, where the counsel for the respondent applied to the court for leave to file a demurrer or leave to move to quash certain articles of impeachment, the court refused the request and required the defendant to plead to the merits, stating that in the course of the trial of the case all those questions of law could be availed of by the parties and would be decided by the court.

Now, we think that if a precedent of this kind is established, if this Senate will go on and hear dilatory plea after dilatory plea, first a plea to the jurisdiction, a plea in abatement, then a demurrer to the form, there is no end; and when shall we arrive at a trial of this case upon the merits? If there was an officer of this Government now in office who endangered the liberties of the people, who was engaged in a conspiracy against the Government, and he stood impeached before the Senate, if these dilatory pleas were allowed, the evil to be apprehended from his action might be carried into effect and realized. And yet it is claimed that it is a matter of right by the respondent, on the other side, and the courts of impeachment of this country have, by precedent at least if not by direct vote, decided that when an officer of the Government is impeached he can not be suspended from the functions of his office while the trial is progressing. No; it has been the aim and intention of the courts in all cases of impeachment that a speedy trial should be had, that the respondent should be required to answer to the merits, and then the court would consider the question, and the whole question, and protect and save the country.

Mr. Carpenter also raised another question: [17]

The question of the sufficiency in law of the articles themselves has not been raised by a demurrer thereto, has not been argued by either side, nor submitted to the court. The only question raised, argued, or submitted was the question of jurisdiction of the defendant; that is, whether the court had power to pass upon the sufficiency of the articles, or take any other step whatever in the cause. Had the court affirmed jurisdiction (as I claim it has not), then we could have moved to quash the articles, or demurred to them, or joined issue for trial. I do not hesitate to affirm that none of these articles, with possibly one exception, state the necessary facts to constitute a good indictment. Mere rhetoric and denunciation will not do. It is not enough to say that the defendant has been guilty of high crimes and misdemeanors; but the articles must state every fact which is an element of crime. And although the same strictness of pleading has not been required in cases of impeachment as in ordinary criminal causes, yet every fact relied upon to constitute the crime must be stated; and on the trial the proof can not go beyond the averments of the articles. In the several impeachment trials in this country defendants have not resorted to formal pleadings. In Blount's case his response was more like an answer to a bill in chancery than a pleading in a criminal cause. It was a plea to the jurisdiction, a demurrer, and answer, all in one.

But I assume that where the respondent chooses to avail himself of formal and particular pleading, which the experience of a thousand years has shown to be essential to the protection of innocence, this court will not deny the right, at least without a hearing.

I therefore assume that the court, on its attention being called to the very sweeping terms of this order, will, of its own motion, vacate so much of it as holds that the articles of impeachment are sufficient in law.

The sufficiency in law of the articles is as material to the conviction of the respondent as is the truth in point of fact of the matters therein charged. Before there can be a conviction several things must be established:

First. That the defendant, in fact, has done, or omitted to do, certain things;

Second. That the things he has done or omitted constitute a crime;

[17] Record of trial, page 159.

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Third. And not merely a crime, but a high crime or misdemeanor, meriting impeachment; and

Fourth. That the respondent is subject to impeachment, and this court has jurisdiction over him for the hearing and determination of this cause.

If any one of these elements be wanting, there can be no conviction. And of course, as soon as any one of these propositions is established in favor of the respondent he is entitled to an acquittal. I think the point as to jurisdiction has been determined in his favor, inasmuch as more than one-third of the Senate has declared against jurisdiction. But what course we ought to take as a matter of expediency—whether we should move to vacate the order altogether and that the respondent be dismissed; or demur to the articles; and if the demurrer is overruled, answer to the merits and go to trial—should only be determined after consultation of the respondent's counsel.

To this Mr. Manager Scott Lord replied: [18]

One other suggestion. We apprehend that the true object of all trials, civil or criminal, is to reach the merits at the earliest moment. The defendant here stands accused by impeachment, having been a high officer of the Government, of certain crimes and misdemeanors. He has put in one dilatory plea, and that has occupied all his time. He now proposes, after this Senate has so deliberately entered this order; after it, having examined all the pleadings, has found these articles of impeachment sufficient, to try again in that direction. He proposes to demur to the articles of impeachment; and while I can not, perhaps, strictly call a demurrer a plea, yet, in a broader sense, it is. The defendant proposes another dilatory proceeding; I may call it properly another dilatory plea. And how many shall he have? It is absolutely in the discretion of the Senate whether to give him this privilege or not. It is in the discretion of any court of civil or criminal jurisdiction, unless controlled by statutory law.

This defendant accused of these high crimes, after having by his dilatory plea occupied weeks of time, seeks further delay. After this court, under rules which are broader and more liberal than in other courts in regard to pleadings, has deliberately overruled his demurrer, deliberately held his plea for naught, and that the only pleading before this tribunal is the pleading called the "articles of impeachment," and after this court has solemnly adjudged that these articles are sufficient, the defendant by his learned counsel asks you to go back into the courts of law, for rules not binding even there. He wants you to adopt the rules which he says are held in criminal courts, and give him the right, under all the circumstances of this case, to put in this further dilatory plea, because he says what? That he could go into a criminal court and take up these articles of impeachment, and one by one satisfy the tribunal that the pleading would not be good as an indictment. What if he could, and what if the technical rule availed here? It nevertheless is in the discretion of this court whether it will allow him again to stand on a technical point instead of proceeding to the merits. I apprehend it is an application which will not be favored by the Senate. I apprehend this Senate sitting as a court of impeachment will hardly take the position, after this deliberate order, that it will open the whole case again, and for what? Not from a sense of justice to the defendant; not for the purpose of ascertaining the truth; but simply that learned counsel skilled in the criminal courts may stand in this august tribunal and urge that these articles of impeachment have not all the words and phraseology which he thinks would be necessary in a court of criminal jurisdiction to maintain an indictment.

I will not now discuss the question whether the articles of impeachment are sufficient. The counsel himself has confessed the rule that pleadings in this court are entirely distinct and separate as to mere technical rules from pleadings in ordinary criminal proceedings. This court has a broader range; it has an easier path in its high jurisdiction to reach the merits, and therefore I may say, with all respect to this tribunal, that it would be a most extraordinary proceeding, in the judgment of the managers, for this court, without claim of any possible injustice to the defendant, to open this case for another dilatory plea instead of requiring him to go to trial upon the merits.

The Senate finally [19] discarded an order providing that the respondent "have leave to plead further or answer the articles of impeachment within ten days," and agreed to the following:

[18] Record of trial, page 160.
[19] Senate Journal, p. 949; Record of trial, pp. 164, 165.

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Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that in default of an answer to the merits within ten days, by respondent, to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

This question of pleadings was touched upon also in the final arguments, Mr. Matt H. Carpenter, speaking [20] at length on the view already advanced by him, and Mr. Manager Scott Lord opposing.[21]

2124. The answer of respondent is part of the pleadings of an impeachment trial, and exhibits in the nature of evidence may not properly be attached thereto.—On February 3, 1905,[22] in the Senate, sitting for the trial of Judge Charles Swayne, at the end of the portion of respondent's answer relating to the first article of impeachment, certain exhibits were attached to show the practice of other Federal judges in certifying their expense accounts to the Department at Washington. Judge Swayne was accused in the first article of rendering false accounts.

At the conclusion of the reading of this portion of the answer, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, we have attached as exhibits to this answer to the first article three certificates, one from the fifth, one from the seventh, and one from the ninth judicial circuits of the United States, which show that, almost without exception, the amount of $10 per diem was drawn by each and all of the judges, both of the circuit and district courts of those circuits, in their attendance outside of their districts, under the provisions of the law. We have been unable up to the present time to secure from the Secretary of the Treasury the additional certificates for the other districts.

After concluding the reading of the entire answer of the respondent, Mr. Thurston said:

Now, Mr. President, referring to the fact that certain exhibits which we desired to attach to our answer to article No. 1 had not been attached because of the fact that the Secretary of the Treasury in the short space of time has been unable to furnish it to us we move as follows:

Counsel for respondent move on order giving them leave to hereafter attach to the answer herein to article 1, as exhibits, additional copies of certificates of the Secretary of the Treasury, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuits, as their reasonable expenses for travel and attendance while holding court away from the place of their residences, and outside of their respective districts, in the year 1903 it having been impossible for the Secretary of the Treasury to prepare and furnish the same to respondent up to the present time.

Mr. Manager Palmer said that the managers did not admit that these exhibits were material,[23] but that they would not object except on the question of delay that might be caused.

Mr. Charles W. Fairbanks, of Indiana, offered this order:

Ordered, That the respondent, Charles Swayne, have leave to hereafter, not later than the 10th instant, attach as further exhibits to his answer to article 1 of impeachment copies of the certificates of the Secretary of the Treasury, referred to in said answer, showing the amounts certified to and received from the United States by the judges of the first, second, third, fourth, sixth, and eighth judicial circuit as their reasonable expenses for travel and attendance while holding court away from the place of their residence, and outside of their respective districts, in the year 1903.

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[20] Record of trial, pp. 330–334.
[21] Pages 334, 335.
[22] Third session Fifty-eighth Congress, Record, pp. 1820, 1830–1832.
[23] They had been excluded in the examination before the committee of the House of Representatives, with the assent of the minority as well as majority of the committee. See minority views, House Report No. 3021, third session Fifty-eighth Congress.

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Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, as a matter of good practice—and I presume we are to conduct this trial according to good practice—it seems to me that this is a request for time in which to exhibit evidence as a part of the pleadings. If this matter is admissible before this court at all, it is admissible as evidence. It does not occur to me as an appropriate proceeding to be giving time in which counsel for the respondent may file evidence with their pleadings. That is as I look at it. If it were desirable to give the counsel time to prepare new allegations I should not object to an order for that; but I do object to having this court put into the attitude of expressly and by order providing for delay, in producing as a part of the pleadings, what properly, as it seems to me, belongs only to the production of evidence.

Mr. Manager Palmer also said:

If, as suggested by the Senator from Texas [Mr. Bailey], it is true that these exhibits are to be considered as evidence, then certainly they ought to be attached before the managers are asked to reply. We had expected to ask until next Monday to reply or to demur or to except to this answer, and the answer ought to be complete before we are asked to reply to it. If this time is postponed until the 10th of February our answer will have been in, and if these matters are matters of evidence it might be quite a serious consideration. Therefore we object to the extension of the time until the 10th of February.

Mr. Thurston then said:

The President, the respondent and his counsel are so anxious to interpose no obstruction to the speedy trial of this case that if, as suggested, our motion would be taken as a ground for asking delay we here and now withdraw it.

The Presiding Officer announced:

The motion is withdrawn, and the Chair supposes the order proposed by the Senator from Indiana is also withdrawn.

So the subject was dropped.

2125. Counsel for respondent in the Swayne trial interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto.

During time of presentation of testimony in the Swayne trial counsel of respondent were permitted to file a brief on their pleas to jurisdiction.

Form of brief on plea to jurisdiction filed by counsel for respondent in Swayne trial.

On February 22, 1905,[24] in the Senate sitting for the impeachment trial of Judge Charles Swayne, after the counsel for the respondent had begun to present testimony, but before they had concluded, Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, the respondent has at all times insisted, and still does insist, upon the pleas to the jurisdiction as to the first seven counts. It had been the purpose of my associate, Mr. Higgins, to present our statement and arguments with respect to those as a part of his opening statement. In deference to the evident wish of the Senate and to the imperative demand for the completion of the legislative duties of the Senate, he decided to waive that privilege.

We have prepared a statement and argument as to those pleas to the jurisdiction which we could, of course, use on the final arguments in the case. But we feel it would be fairer to the Senate and to the manager to present those now, and as our position upon the pleas to the jurisdiction and as a part of our presentation of the case we now ask to present our statement and argument and have it printed in the Record, so that the Senate and the managers may have an oppor-

[24] Third session, Fifty-eighth Congress, Record, pp. 3026–3035.

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tunity before the close of the case to consider it. [To the managers on the part of the House.] Is there any objection?

Mr. Manager Henry W. Palmer, of Pennsylvania, replied that the managers did not object.

The Presiding Officer[25] said:

The brief prepared by counsel on the question of jurisdiction as to the first seven articles will be inserted in the Record unless there be objection on the part of the managers or of Senators.

Mr. Thurston then said:

Mr. President, I feel it is our duty to state that this presentation of the historical, constitutional and parliamentary procedure in impeachment proceedings has been prepared not by counsel for respondent, whose names are attached to it, but by a gentleman who is renowned as a scholar along constitutional lines and a lawyer of great ability, and without naming him we wish to disclaim any credit that may attach to the preparation of this document.

Mr. Manager Palmer then stated a question, and the following occurred:

Mr. Manager PALMER. Are you demurring to the first seven articles of impeachment upon the ground that they do not charge an impeachable offense? Is that the idea?

Mr. THURSTON. Our pleas are in to that effect, if the manager has read them.

Mr. Manager PALMER. Exactly. I understand you are filing a demurrer to the first seven articles on the ground that they do not charge impeachable offenses.

Mr. THURSTON. We did interpose special pleas to those articles.

Mr. Manager PALMER. And this argument is intended to support those pleas?

Mr. THURSTON. Yes, sir.

Mr. Manager PALMER. Of course your demurrer admits the truth of all that is stated in those articles.

Mr. THURSTON. I beg pardon.

Mr. Manager PALMER. It could not be a demurrer if it did not.

Mr. THURSTON. I beg pardon, Mr. President. We have not demurred. Our pleas stand, and the manager can take any legal view of them that he chooses to present.

The heading and signatures of the document were as follows:

In the Senate of the United States sitting as a court of impeachment. The United States of America against Charles Swayne, a judge of the United States in and for the northern district of Florida. Upon articles of impeachment presented by the House of Representatives.

Argument in support of pleas to the jurisdiction interposed in behalf of the respondent to articles 1, 2, 3, 4, 5, 6, and 7, such pleas presenting the contention that the facts set forth in said articles, even if true, do not constitute impeachable high crimes and misdemeanors as defined in the Constitution of the United States.

* * * * * * *

The pleas to the jurisdiction interposed in behalf of respondent to articles 1, 2, 3, 4, 5, 6, and 7 should be sustained, because the facts set forth in said articles, even if true, do not constitute "high crimes and misdemeanors," as defined in Article II section 4, of the Constitution of the United States.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Counsel for Respondent.

2126. The managers being introduced in the Senate and having signified their readiness to exhibit articles of impeachment, the Presiding Officer directs proclamation to be made.

Form of proclamation made by the Sergeant-at-Arms when managers bring articles of impeachment to the Senate.

[25] Orville H. Platt, of Connecticut, Presiding Officer.

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Articles of impeachment being exhibited by the managers, the Presiding Officer says that the Senate will take proper order and inform the House thereof.

In 1868 the Senate ceased in its rules to describe the House of Representatives while acting in impeachment cases as the grand inquest of the nation.

Present form and history of Rule II of the Senate rules for impeachments.

Rule II of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the [Presiding Officer] of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The origin of this rule is found in the trial of William Blount in 1797.[26] In 1804 [27] at the impeachment of Judge Pickering, the committee having charge of the rules—Messrs. Uriah Tracy, of Connecticut, Stephen R. Bradley, of Vermont, Abraham Baldwin, of Georgia, Robert Wright, of Maryland, and William Cocke, of Tennessee—made a new draft of the words to be repeated after proclamation. At the trial of Blount they had been:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against ——— ———, on pain of imprisonment.

Mr. Tracy's committee modified this to this form:

All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachments, articles of impeachment against ——— ———.

For the trial of Judge Chase, in 1805, the rule was adopted in practically the identical form agreed to by Mr. Tracy's committee, except that the words "sitting as a court of impeachments" were omitted.[28] There does not seem to have been significance in the omission of these words, since the articles of impeachment against Judge Chase were received by the Senate sitting as a high court of impeachment. In 1868, during the proceedings against President Johnson, the rules were revised, but the committee reported [29] this rule in the form as used since 1805. While the rules were under debate on February 29, Mr. Thomas A. Hendricks, of Indiana, said as to the language of the announcement:

In the Constitution which the fathers adopted, after grave consideration, they said that the House of Representatives should impeach an officer. We say that "the grand inquest of the nation" shall impeach. Where is the advantage of this new language? Why not make proclamation in the Senate here that "the House of Representatives impeaches the President of the United States?" It is not

[26] First session Fifth Congress, Senate Journal, p. 433; Annals, p. 498.
[27] First session Eighth Congress, Senate Journal, pp. 382, 383; Annals, p. 225.
[28] Second session Eighth Congress, Senate Journal, pp. 509, 510.
[29] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, pp. 246, 248, 811; Globe, pp. 1521, 1522, 1594.

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sufficiently high sounding is all the trouble about it. It expresses exactly the thought that the Constitution does, truly and correctly, and does not refer us to some body of men not known to our system of government.

The matter was not further discussed, and on March 2,[30] on motion of Mr. Hendricks, without further debate or diversion, the words "grand inquest of the nation" were stricken out and "House of Representatives" inserted. So the rule came to its present form.

2127. Upon presentation of articles of impeachment and the organization of the Senate for the trial, a writ of summons is issued to the accused.

The writ of summons to one accused in articles of impeachment recites the articles and notifies him to appear at a fixed time and place and file his answer.

The rule specifying the method of serving writs of summons to one accused in articles of impeachment.

The person accused in articles of impeachment failing to appear or to answer, the trial proceeds as on a plea of not guilty.

The person accused in articles of impeachment may appear in person or by attorney.

If a plea of guilty be entered in answer to articles of impeachment, judgment may be entered without further proceedings.

Present form and history of Rule VIII of the Senate sitting for impeachment trials.

Rule VIII of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

This rule dates from 1868,[31] when it was adopted preliminary to the trial of President Johnson. It was reported from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman, in its present general form; but during consideration in the Senate the word "court" was stricken out wherever it occurred, and the word "Senate" substituted, to conform to a general decision of the Senate.

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[30] Senate Journal, p. 246; Globe, p. 1594.

[31] Second session Fortieth Congress, Senate Journal, pp. 238, 812; Globe, pp. 1533, 1534, 1602; Senate Report No. 59.

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2128. At 12:30 p.m. on the day of the return of the summons against a person impeached, the Senate suspends business and the Secretary administers an oath to the returning officer.

Form of oath administered to the returning officer in an impeachment case.

The oath taken by the returning officer in an impeachment case is spread on the records.

Present form and history on Rule IX of the Senate in impeachment cases.

Rule IX of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, ——— ———, do solemnly swear that the return made by me upon the process issued on the —— day of ——, by the Senate of the United States, against ——— ———, is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

This rule, with slight changes, date from the Chase trial in 1805.[32] In 1868[33] in preparation for the trial of President Johnson, it was adopted in exactly its present form.

2129. In an impeachment case the writ of summons being returned, the accused is called to appear and answer the articles.

The person impeached being called to appear and answer, a record is made as to appearance or nonappearance.

The person impeached may appear to answer the articles in person or by attorney, and a record is made as to the mode of appearance.

When the person accused in articles of impeachment appears by agent or attorney, a record is made naming the person appearing and the capacity in which he appears.

Present form and history of Rule X of the Senate sitting for impeachments.

Rule X of the "Rule of procedure and practice in the Senate when sitting on impeachment trials" provides:

The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appear, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

This rule was first adopted in 1805,[34] for the Chase trial. In 1868,[35] during proceedings for the impeachment of President Johnson, the rules were generally reviewed, but this rule was changed only by dropping out the word "exhibited" after "articles of impeachment." It was then agreed to in the present form.

2130. In impeachment proceedings before the Senate counsel for the respondent is admitted and heard.

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[32] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[33] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 134.
[34] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[35] Second session Fortieth Congress, Senate Journal, p. 813; Globe, p. 1534; Senate Report No. 59.

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Present form and history of Rule XIV of the Senate sitting for impeachment trials.

Rule XIV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

This rule in identically its present form dates from the Chase trial in 1805.[36] It then embodied what had been the practice in preceding trials.

2131. In impeachment trials all motions made by the parties or counsel are addressed to the Presiding Officer, and must be in writing, if required.

Present form and history of Rule XV of the Senate sitting for impeachment trials.

Rule XV of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

All motions made by the parties or their counsel shall be addressed to the President Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

This rule was first drafted in 1805,[36] for the trial of Judge Chase. It had then an additional clause providing how the vote should be taken on such motions. In 1868,[37] when the rules were revised, it was given its present form, the words "presiding officer" being substituted for "President of the Senate," and the clause relating to voting being stricken out. The words "or any Senator" were also inserted at this time.

2132. In an impeachment trial the case is opened by one person on each side.

The final arguments on the merits in an impeachment trial are made by two persons on each side, unless ordered otherwise upon application.

The final argument on the merits in an impeachment trial is opened and closed by the House of Representatives.

Present form and history of Rule XXI of the Senate sitting for impeachment trials.

Rule XXI of the "Rules of proceeding and practice for the Senate when sitting in impeachment trials" is as follows:

The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

This rule dates from 1868,[38] when a committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported a revision of the rules, in view of the approaching trial of President Andrew Johnson. The rule as reported was in this form:

XXI. The final argument on the merits may be made by two persons on each side, and the argument shall be opened and closed on the part of the House of Representatives.

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[36] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[37] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.
[38] Second session Fortieth Congress, Senate Report No. 59.

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On March 2,[39] this rule was debated fully, and amended so as to stand in its present form. Mr. Charles Sumner, of Massachusetts, proposed an amendment which, after discussion, was adopted in form as follows:

The case, on each side, shall be opened by one person.

During the debate Mr. Roscoe Conkling explained this amendment on behalf of Mr. Sumner, who has been called away:

The Senator from Massachusetts thought that when the managers came here and rose to open their case and had proceeded an hour perhaps the Senator from Indiana or some other Senator would say, "This now is a proceeding, a question falling within the first of these two rules; it is a preliminary or interlocutory matter, and therefore to be restricted to an hour." That there might be no question about it, the Senator from Massachusetts proposes that the two rules shall stand precisely as they are now, the latter of which rules gives to counsel the right to sum up the evidence at any length they please, be it a day or four days or ten days each; but that before the evidence has been delivered, before the witnesses are called, that explanatory statement which is called "an opening" shall be made by one person on each side, one manager on the part of the House of Representatives in the beginning, and one counsel on the part of the respondent after the evidence for the prosecution is closed and the respondent comes to make his case. To cover that, the Senator from Massachusetts interposes this rule between the two (leaving the previous rule to operate upon interlocutory matters, as it does), to provide for the opening of the case on each side respectively before the evidence is delivered, and then to leave to counsel to sum up, or close the case, or, in the language of the rule, to make the "final argument on the merits" at any length they please. That is the meaning of it, as I understand it.

A question having been raised by Mr. Thomas A. Hendricks, of Indiana, Mr. Conkling said further:

The idea is that the practice is to be precisely as it is in Indiana—not the practice in Westminster Hall, but the practice as we know it in this country. The plaintiff, for illustration, opens his case and gives his evidence and finishes it; then the defendant opens his case and gives his evidencce and finishes it; and then the summing up occurs. That is the design here—that the prosecutors for the House of Representatives open their case and prove it as far as they can; then the respondent opens his case and proves it as far as he can. That is precisely what the amendment means, I submit. I know that is the design of the mover.

The amendment was agreed to without division.

A more serious question arose as to the number of persons who should be permitted to sum up on each side. Mr. James W. Grimes, of Iowa, objected that the number should not be restricted, saying:

If I remember rightly the history of impeachment trials in England, the members of the managers and the counsel on the part of the defense have addressed their arguments to a particular issue that was involved in a particular specification; and I think that was the case in this country in the celebrated Chase trial, and in the Peck trial.. There were divers and sundry specifications, to each of which the defendant pleaded not guilty. One manager argued each particular specification; and one of the counsel on the part of the defense replied to him. Each article was one of the points upon which the court had to pronounce that the defendant was either guilty or not guilty, and each was argued separately.

Now, had we not better leave this whole matter to be settled by a conference between the attorneys of the respective sides when they shall reach the argument than to say now peremptorily that ten or twenty articles shall all be combined in the speech of the counsel instead of being severed, as they have been in previous trials, and limiting them to two speeches on each side? My own opinion is that a question of practice of that kind belongs purely to the court; and if we are to resolve ourselves from a Senate into a court, it ought to be

[39] Senate Journal, pp. 242, 243, 814; Globe, pp. 1580-1585.

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settled by the court itself, when the Chief Justice, who is to preside over us, is present to give us the aid of his counsel.

Mr. Garrett Davis, of Kentucky, speaking in the same line, said:

I can state to the honorable Senator from Vermont and to the Senate that in every case of crime of any great interest, and especially a capital crime, I have never known the argument of the case on the part of the defense by a less number of counsel than three, and it is often by five. I agree with the Senator from Indiana that in the management of the case, if you introduce more than two counsel, if they are competent counsel, you embarrass the case and you weaken the prosecution or the defense. But it is not so always in the argument of cases of importance. It is a universal practice in the criminal courts of Kentucky that where a case of interest involving capital punishment is under trial, and the accused desires it, he is heard by at least three counsel in his defense.

Mr. President, I have learned this fact in relation to impeachments—that they are to be treated with more liberality on both sides than the stringent practice and forms and rules of proceeding in criminal cases, and that those rules which are introduced into criminal cases to economize time have never been resorted to as a general rule in the trial of impeachments. It seems to me that all the modes of proceeding and all the practice in cases of impeachment ought to be more liberal, ought to be more free from restrictions, and especially technical restrictions, and restrictions simply to save time, than criminal prosecutions. And yet the honorable committee that have reported these rules of proceeding and practice are restricting the proceedings in this and all future cases of impeachment much more rigorously than is known in the criminal practice in the courts of Kentucky.

Mr. James Dixon, of Connecticut, said:

I most deeply regret to see what I think I see, what I can not help seeing, in the remarks of the Senator from Massachusetts and some other Senators. That Senator speaks as if the consumption of a day or two days or three days or even four days, taken up in the defense of this great trial, was to be regretted, a thing to be deprecated and avoided; and he points out as something to be shunned that Mr. Burke spoke four days in the great trial of Warren Hastings. I confess I have not that feeling. I regret that the Senator has it; I regret that any Senator has it. I do not think it is to the credit of this body when entering upon this great trial, impartial as undoubtedly we all are, wishing to do justice in a solemn case of this kind, bringing before us the President of the United States, the gentlemen are disposed to deny him on the final argument upon ten charges the privilege of being heard by as many counsel as he wishes.

In behalf of the restriction, Mr. Sumner said:

The Senator forgets that on the trial of Judge Peck Mr. Wirt, in a speech which I have sometimes thought was the most masterly forensic effort in the history of our country, occupied the attention of the Senate two full days. The Senator will also remember that on the trial of Warren Hastings, Mr. Burke occupied the attention of the court of impeachment for four successive days, and there were other gentlemen on both sides, managers, and also counselors for the defense, who occupied the attention of the court each for several days.

I merely refer to these historical precedents that we may be reminded in advance of the possibilities of a trial like this; and a Senator near me says, the probabilities. Perhaps that is a better word; but I refer to express myself in the most moderate manner, and I therefore said simply "the possibilities." It seems to me that it is our duty to provide against probabilities or possibilities even.

And Mr. George F. Edmunds, of Vermont, said:

Now, as to the propriety of this rule as a general rule. Is there a Senator on this floor who would stand up and say of his own personal knowledge of criminal practice in his own State that this rule does not exist in all their courts? I do not mean as a written rule necessarily; but is it not a general rule in every court in the United States of America, either State or national, that only two counsel are heard on a side in the summing up of a cause? A man is tried for his life, and, as a general rule—there may be exceptions, but I never heard of them in that case—only two counsel are heard in his defense, and only two for the prosecution. So all civil rights and questions involving the operations of law over vast

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sections of country are determined in the same way. This very day, in another Chamber of this building, before the Supreme Court of the United States, a cause is argued which may involve the peace and safety of the inhabitants of ten States, and of millions of persons, and it is confined, by the rules of that court, to two counsel on a side, and nobody complains that any injustice is being done to any one.

After the debate had continued for some time, Mr. Edmunds proposed the following amendment, which was agreed to without division:

Insert, after the words "on each side," the words "unless otherwise ordered by the court upon application for that purpose."

The word "court" was afterwards changed to "Senate" in accordance with a general conclusion to which the Senate had arrived.

Mr. Dixon, referring to the law of Connecticut as a precedent, then proposed the addition of the following clause:

And the counsel of the party accused in all trials to which these rules are to apply shall be allowed the closing turn in the final argument.

Mr. Orris S. Ferry, of Connecticut, said it had been the law of Connecticut since 1848, but had worked badly. The amendment was rejected without division.

2133. In the opening address in an impeachment trial it is proper to outline what it is expected to prove; but it is not proper to quote evidence which may or may not be admissible later.—On February 10, 1905,[40] in the Senate sitting for the trial of Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, was making the opening address on behalf of the managers, and had outlined what they expected to prove in support of the article charging the improper use of a private railway car. Mr. Palmer went on to say:

The respondent acknowledged the facts, as above stated, but defended his action upon the ground that the property of the railroad company being in the hands of the court, he, the judge of the court, had a right to use it without making compensation to the railroad company.

When questioned on the subject, we shall prove that he said, in answer to this question:

"Q. You said this car was one of the cars in possession of the court, because the road was in the hands of a receiver?—A. Yes."

"Q. You said that it was the privilege of the court to use that car, because the road was in the hands of a receiver?—A. Yes."

Mr. John M. Thurston, of counsel for the respondent, objected:

Mr. President, the statement that is now being read, as the record shows, is a part of the testimony of Judge Swayne taken before the committee of the House of Representatives, which, under the acts of Congress, can not be used against him in any criminal prosecution; and therefore it is improper to make the statement that the chairman of the managers is now proceeding to make. We object to the presentation here, by statement or otherwise, of any testimony that was given by Judge Swayne, the respondent, before the House committee, claiming his right, under the law of the Congress of the United States, that it can not be used against him in any criminal prosecution, of which this certainly is one.

After brief argument the Presiding Officer [41] said:

Of course, the managers on the part of the House and the counsel on the part of the respondent have somewhat wide latitude in their opening statements, but the Presiding Officer is of opinion that testimony which has been given by Judge Swayne on the occasion referred to ought not to be cited at length. He has a right to plead his privilege. He can not be obliged to criminate himself. * * * It seems to the Presiding Officer to be an indirect way of getting before the

[40] Third session Fifty-eighth Congress, Record, pp. 2232–2233.
[41] Orville H. Platt, of Connecticut, Presiding Officer.

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Senate the fact that Judge Swayne had testified to this. The Presiding Officer suggests to the manager that he may properly omit the reading of testimony which had been given on another occasion by Judge Swayne.

Very soon after, in outlining the case as to the charge of nonresidence, Mr. Palmer said:

The facts, as they will appear in the testimony, are that after his confirmation as judge in 1890 he established his residence at St. Augustine, in a house rented from Mr. Flagler, and lived there with his family until the boundaries of his district were changed by the act of Congress in the year 1894. Judge Swayne states that he was urged by his friends not to move his family or furniture, that the next Congress would probably restore his district, and therefore his furniture was allowed to remain in St. Augustine until the year 1900, when he rented the Simmons cottage in Pensacola and lived there at intervals until 1903, when his wife bought a home. During the six years——

Mr. Higgins objected.

Mr. President, I wish to say that that statement is again contrary to the rule we have invoked as to the statute.

The Presiding Officer [42] held—

The Presiding Officer thinks that the manager has a right to state what he expects to prove, but that he ought not to go further by citing any testimony which has been given by Judge Swayne on another occasion as the means by which he expects to prove it.

2134. The opening address in an impeachment trial should be confined to what is to be proven, and how it is to be proven, and should not include extended argument on the whole case.—On February 21, 1905,[43] in the Senate sitting for the impeachment trial of Judge Charles Swayne Mr. Anthony Higgins, of counsel for the respondent, was making the opening address preliminary to the introduction of testimony for the respondent, and in the course of his remarks made various citations which he asked the Secretary to read. Thus he had read extracts from the decisions of the Supreme Court of the United States in the cases of Bradley *v.* Fisher; In re Cuddy, petitioner; In re Savin, and an extract from the answer of one O'Neal in a lawsuit out of which arose one of the causes of Judge Swayne's impeachment.

After the reading of this extract the Presiding Officer interrupted saying:

The Secretary will suspend for a moment. Why does the counsel claim that this is proper in an opening? The Presiding Officer supposed that the opening of a case on the part of the managers or on the part of counsel should be limited to a statement of the issues raised in the case, and what the parties propose to prove either for the prosecution or the defense. How do these extracts which the Secretary has been asked to read fall within what the Presiding Officer supposes to be the proper line of an opening on behalf of the respondent?

Mr. Higgins replied:

I will state, Mr. President, in the first sentence, that a perusal of the statement of counsel in the Peck case shows that the managers went very fully into the merits of the case on the argument. Mr. Meredith, in opening for the respondent, did not. I thought, therefore, that I was entirely within the rules of this anomalous proceeding, which is not by common law, is not in equity, but is according to the lex et consuetudo parliamenti. The articles and answers are drawn from the civil law. They are not known to our own practice, and therefore I have supposed that it was a proceeding where the largest latitude was given to counsel in the first instance.

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[42] Orville H. Platt, of Connecticut, Presiding Officer.
[43] Third session Fifty-eighth Congress, Record, p. 2977.

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In the second place I desire to say, Mr. President, on this interesting point that the Greenhut testimony has not been read, and it is impossible to get a statement of the issues without it. I could have had read the affidavit of Greenhut. I could have read Greenhut's testimony, so as to get them before the court as to what they would show, but I have elected to leave them out, and was stating what O'Neal's was. Moreover, I thought it was the shortest way in which I could proceed.

The Presiding Officer then said:

The Presiding Officer, of course, does not wish to limit counsel for respondent as to any of their just rights, but as was suggested a moment ago the Presiding Officer supposed that an opening on behalf of the person accused was to be confined strictly to the issues raised and what the counsel expected to prove, and how they expected to be able to prove it. This opening seems to have taken the form of an extended argument on the whole case, which the Presiding Officer had supposed would be more proper, to say the least, when the case came to be finally argued. Perhaps the Presiding Officer is only expressing a little the impatience of the Senate, and without attempting to fix limits, he wants to suggest that the opening should be concluded as quickly and as rapidly as counsel feel that it can be in presenting their case to the Senate.

2135. At the trial of President Johnson both managers and counsel for respondent objected successfully to the rule limiting the number speaking in final argument.

In the final argument in the Johnson trial the conclusion was required to be by one manager.

The privilege of submitting a written instead of an oral argument in the final summing up was allowed in the Johnson trial.

In the Johnson trial the Senate declined to limit the time of the final arguments.

The Chief Justice ruled during the Johnson trial that a proposed order should, under the Senate practice, lie over one day before consideration.

On April 11, 1868,[44] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Frederick T. Frelinghuysen, Senator from New Jersey, proposed the following:

Ordered, That as many of the managers and of the counsel for the respondent be permitted to speak on the final argument as shall choose to do so.

The Chief Justice [45] held that under the rules of the Senate the order would not be considered until the next day.

On April 13,[46] the order came up in the Senate sitting for the trial, and Mr. Charles Sumner, of Massachusetts, at once proposed the following to come in at the end:

Provided, That the trial shall proceed without any further delay or postponement on this account.

Mr. Manager Thomas Williams, of Pennsylvania, referred to the rule of the Senate (Rule XXI), which provided that the final arguments "may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives," and said that the rule as it stood was calculated to embarrass the managers, whose number had been fixed by the House at seven. In the preceding impeachment cases wherein a defense had been made,

[44] Second session Fortieth Congress, Senate Journal, p. 887; Globe Supplement, p. 147.
[45] Salmon P. Chase, of Ohio, Chief Justice.
[46] Senate Journal, p. 891; Globe Supplement, pp. 160–163.

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the cases of Judges Chase and Peck, the numbers of managers were, respectively, seven and five, and in the one case six of the seven managers were heard in concluding argument, and in the other all five were heard. In neither of those cases did there seem to have been any question as to the right of the House to be heard through all its managers. And going to the English precedents, in the famous case of Warren Hastings all the managers were heard in argument.

After further debate Mr. Frelinghuysen modified his order as follows:

Ordered, That as many of the managers and of the counsel for the President be permitted to speak on the final argument as shall choose to do so: *Provided*, That the trial shall proceed without any further delay or postponement on this account: *And provided further*, That only one manager shall be heard in the close.

Mr. Manager George S. Boutwell objected to the proposition to limit the close to one manager. He recited that in the trial of Judge Peck the case was first summed up by two managers on the part of the House, then the case of the respondent was argued by two of his counsel, and then the case was closed by the arguments of two managers. And in the case of Judge Peck, after the counsel for the respondent had concluded, the case was closed by three managers. He also cited the ably conducted trial of Judge Prescott, in Massachusetts, wherein two arguments were made by the managers after the close of the argument for the respondent.

Mr. Sumner then proposed to amend by striking out the last proviso and inserting:

And provided, That according to the practice in cases of impeachment the several managers who speak shall close.

Mr. George H. Williams, of Oregon, in order to test the sense of the Senate as to the desirability of changing the existing rule, moved that the order and pending amendment be laid on the table. This motion was agreed to, yeas 38, nays 10.

On April 14,[47] Mr. Sumner offered this order:

Ordered, In answer to the motion of the managers, that under the rule limiting the argument to two on a side unless otherwise ordered, such other managers and counsel as choose may print and file arguments at any time before the argument of the closing manager.

This order going over for consideration until the next day a discussion arose as to the time of submitting the written arguments, and Mr. John Conness, of California, proposed this amendment:

Strike out all after the word "ordered" and insert:

"That the twenty-first rule be so amended as to allow as many of the managers and of the counsel for the President to speak on the final argument as shall choose to do so: *Provided*, That not more than four days on each side shall be allowed; but the managers shall make the opening and the closing argument."

The question being taken, the substitute was disagreed to, yeas 19, nays 27.

Thereupon Mr. Jonathan Doolittle, of Wisconsin, proposed an amendment:

Strike out all after the word "ordered" and insert:

[47] Senate Journal, pp. 896, 897; Globe Supplement, pp. 174, 175.

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"That upon the final argument two managers of the House open, two counsel for the respondent reply; that two other managers rejoin, to be followed by two other counsel for the respondent; and they, in turn, to be followed by two other managers of the House, who shall conclude the argument."

Thereupon Mr. Charles D. Drake, of Missouri, moved that the proposed order and pending amendment be postponed indefinitely. This motion was agreed to, yeas 34, nays 15.

On April 20,[48] after the introduction of evidence had been concluded, Mr. Manager John A. Logan asked of the Senate sitting for the impeachment trial, that he be permitted to file a printed argument instead of arguing orally. After some discussion Mr. William M. Stewart, a Senator from Nevada, offered this order:

Ordered, That the honorable Manager Logan have leave to file his written argument to-day and furnish a copy to each of the counsel for the respondent.

To this Mr. John Sherman, a Senator from Ohio, offered the following as a substitute:

That the managers on the part of the House of Representatives and the counsel for the respondent have leave to file written or printed arguments before the oral argument commences.

Mr. Stewart accepted the substitute as an amendment, and it was considered by the Senate in lieu of the original resolution offered by Mr. Stewart.

On April 22 the amendment of Mr. Stewart, in its modified form, was considered, and Mr. George Vickers, a Senator from Maryland, proposed as a substitute:

As the counsel for the President have signified to the Senate sitting as a court for the trial of the impeachment, that they did not desire to file written or printed arguments, but preferred to argue orally, if allowed to do so: Therefore,

Resolved, That any two of the managers other than those who under the present rule are to open and close the discussion, and who have not already addressed the Senate, be permitted to file written arguments at or before the adjournment of to-day, or to make oral addresses after the opening by one of the managers and the first reply of the President's counsel, and that other two of the counsel for the President who have not spoken may have the privilege of reply, but alternating with the said two managers, leaving the closing argument for the President and the managers' final reply to be made under the original rule.

This proposed substitute was agreed to, yeas 26, nays 20; but immediately thereafter the order as amended by the substitute was disagreed to, yeas 20, nays 26.

Thereupon Mr. Vickers offered the following:

Ordered, That one of the managers on the part of the House be permitted to file his printed argument before the adjournment of to-day, and that after an oral opening by a manager, and the reply of one of the President's counsel, another of the President's counsel shall have the privilege of filing a written or of making an oral address, to be followed by the closing speech of one of the President's counsel, and the final reply of a manager under the existing rule.

Mr. John Conness, a Senator from California, thereupon moved to amend by striking out all after the word "ordered" and inserting:

That such of the managers and counsel for the President as may choose to do so have leave to file arguments on or before Friday, April 24.

The amendment of Mr. Conness was disagreed to, yeas 24, nays 25.

The original order as proposed by Mr. Vickers being under consideration, it was, on motion of Mr. Reverdy Johnson, of Maryland,

[48] Senate Journal, p. 916; Globe Supplement, pp. 247–251.

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amended by striking out the word "one" in the first line and inserting "two." Then, on motion of Mr. John Sherman, of Ohio, the words "or written" were inserted between the words "printed" and "arguments." And on motion of Mr. John Conness, of California, the time was lengthened from "adjournment of to-day" to "before to-morrow noon."

Thereupon Mr. John B. Henderson, of Missouri, offered an amendment subsequently modified to read as follows:

Amend by striking out all after the word "ordered" and inserting:

"That subject to the twenty-first rule all the managers not delivering oral arguments may be permitted to file written arguments at any ime before the 24th instant, and the counsel for the President not making oral arguments may file written arguments at any time before 11 o'clock of Monday, the 27th instant."

A motion to lay the whole subject on the table was disagreed to, yeas 13, nays 37.

At this stage of the proceedings Mr. Thomas A. R. Nelson, of Tennessee, of counsel for the President, addressed the Senate, asking that all the counsel for the President who should be able to participate—Mr. Stanbery being ill—should have leave to address the Senate either orally or in writing, as they should elect. He concluded:

I may say, although I am not expressly authorized to do so, that I am satisfied the President desires that his cause shall be argued by the two additional counsel whom he has provided in the case, besides the three counsel who were heretofore selected for that purpose; and I trust you will not deny us this right. I trust that you will feel at liberty to extend it to all the counsel in the case. If we choose to avail ourselves of it we will do so. I have no sort of objection, so far as I am concerned that the same right shall be extended to all or to more than an equal number of managers on the other side. I trust that the resolution be so shaped as to embrace all the counsel who are engaged in the cause in behalf of the President.

Mr. Nelson also cited the precedent of Judge Chase's trial, when six of the managers and five of counsel for the respondent were permitted to address the Senate.

After consideration of suggested amendments, Mr. Lyman Trumbull, of Illinois, proposed to amend Mr. Henderson's amendment by striking out all after the word "that" and inserting:

As many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally.

And this amendment was agreed to, yeas 29, nays 20.

Then, on motion of Mr. Charles R. Buckalew, of Pennsylvania, these words were added:

But the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Mr. Richard Yates moved to amend by striking out all after the word "that" and inserting:

Four of the managers and four of the counsel for the respondent be permitted to make printed or written or oral arguments, the managers to have the opening and closing, subject to the limitation of the twenty-first rule.

This amendment to the amendment was disagreed to, yeas 18, nays 31.

Then by a vote of yeas 28, nays 22 the substitute of Mr. Henderson, as amended by the propositions of Messrs. Trumbull and Buckalew, was agreed to, and then the order as amended was agreed to. So it was—

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Ordered, That as many of the managers and of the counsel for the President as desire to do so be permitted to file arguments or to address the Senate orally, but the conclusion of the oral argument shall be by one manager as provided in the twenty-first rule.

2136. After elaborate investigation it was held that the opening and closing arguments on incidental questions in impeachment trials belong to the side making the motion or objection.

The claim of the managers to the closing of all arguments arising in course of an impeachment trial has been denied after examination of American and English precedents.

Discussion of the technical forms of pleading in an impeachment trial, as related to right of opening and closing arguments on an incidental question.

Instance wherein the Senate sitting for an impeachment trial fixed the number of managers and counsel to argue on an incidental question.

One of the managers in an impeachment trial may not move to rescind an order of the Senate as to the conduct of the trial.

On March 23, 1868,[49] in the Senate while sitting for the trial of the impeachment of President Johnson, the counsel of the President offered an application that thirty days be allowed the President and his counsel for the preparation of his case.

The managers for the House of Representatives were first heard, Mr. Manager John A. Logan opposing the request. Then Mr. William M. Evarts, of counsel for the President, was heard in favor. Mr. Manager James F. Wilson next opposed, and was followed by Mr. Henry Stanbery, counsel for the President, who favored the application.

Then Mr. Manager John A. Bingham proposed to reply on behalf of the House of Representatives.

The Chief Justice,[50] who was the Presiding Officer under the Constitution, said:

The Chair announced at the last sitting that he would not undertake to restrict counsel as to number without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court the counsel who makes the motion has invariably the right to close the argument upon it.

Thereupon Mr. Manager Bingham asked the decision of the Senate, saying:

Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England and of the Representatives of the people in the United States to close the debate has not been, by any rule, settled against them. On the contrary, in Lord Melville's case, if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My Lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so it is only for the

[49] Second session Fortieth Congress, Globe Supplement, pp. 23–27.
[50] Salmon P. Chase, of Ohio, Chief Justice of the United States.

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sake of insisting upon and maintaining that right which the Commons contend is their knowledge and undoubted privilege—the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required."—(State Trials, vol. 29, p. 762; 44 to 46 George III.)

Lord Erskine "responded the right of the Commons to reply was never doubted or disputed."

Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper. (Wharton's State Trials of the United States, pp. 314–315.)

When I rose, however, at the time the honorable Senator spoke, I rose for the purpose of making some response to the remarks last made for the accused; but as the Presiding Officer has interposed the suggestion to the Senate whether the managers can further reply I do not deem it proper for me to proceed further until the Senate shall pass upon this question.

Some discussion arising, Mr. Reverdy Johnson, of Maryland, called for the reading of this rule:

20. All preliminary or interlocutory questions and all motions shall be argued for not exceeding one hour on each side, unless the Senate by order, extend the time.

Mr. Manager Bingham thereupon stated the the managers had used but thirty-five minutes of their time.

Thereupon Mr. Bingham was allowed to proceed.

At the close of his remarks there was no claim for recognition from the counsel for the President, and a vote was taken.

2137. On April 1, 1868,[51] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, was being examined, when counsel for the President objected to the competency of a certain question. After arguments had proceeded for some time, the following colloquy occurred between Messrs. Managers John A. Bingham and Benjamin F. Butler on the one side and Mr. Henry Stanbery, of counsel for the President, on the other:

Mr. Manager BINGHAM. I rise to a question here. I understand that we speak here under a rule of the Senate, as yet at least, that requires us to be restricted to an hour on each side.

Mr. STANBERY. And one counsel, if you go according to the rule.

Mr. Manager BINGHAM. No; I do not understand that. I understand, on the contrary, that the practice heretofore thus far in the progress of this trial has been to allow the counsel to divide their time as they pleased, within but one hour on each side. The point to which I rise now, however, is this: That we understand that in a proceeding of this sort the managers have always claimed and asserted, where the point was raised at all, the right to conclude upon all questions that were raised in the progress of the trial. The hour has been well nigh expended in this instance on each side, as I am told, though I have not taken any special note of the time. But we raise the question; and I state that the fact that our time has been exhausted, as I am advised, is the only reason why I raise it now; and thus we are cut off from any further reply. Our only objective in raising the question is that we shall not be deemed to have waived it, because we are advised that it was settled years ago in Melville's case by the

[51] Second session Fortieth Congress, Globe Supplement, p. 70.

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Lord Chancellor presiding and by the Peers that the managers might waive their privilege by their silence.

Mr. Manager BUTLER. We have the affirmative.

Mr. STANBERY. On this question? Oh, no.

2138. On April 28, 1876,[52] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the following order was made in a secret session of the Senate, which had retired for consultation, and was reported:

Ordered, That the hearing proceed on the 4th of May, 1876, at 12 o'clock and 30 minutes p.m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed on between themselves, and that such time be allowed for argument as the managers and counsel may desire.

The argument here referred to was on a question in the nature of a demurrer raised by the plea of the respondent that he was not amenable to impeachment for acts done as Secretary of War because of his resignation of said office.

The order having been read in the Senate sitting publicly for the impeachment, Mr. Manager Scott Lord, on behalf of the House of Representatives, announced that the managers requested to be heard on the question of the opening and closing arguments, and also in regard to the number of managers who should be allowed to speak.

Then Mr. Manager Lord proposed a motion [53] to rescind the order.

The President pro tempore [54] said:

The Chair would state to the manager that a motion by him to rescind the order of the Senate would not be in order; but the manager is permitted to address the Senate.

The question being thrown open to argument, three main points were involved:

1. The rule suggested by the state of the question.
2. The American precedents.
3. The effect of English usage.

(1) As to the rule suggested by the state of the question, Mr. Matt. H. Carpenter, of counsel for the respondent, stated, in support of their claim to the opening and closing, the conditions under which the question presented itself:

Now let me briefly state the condition of the pleadings in this case.

To the articles of impeachment the respondent interposed a plea to the jurisdiction, averring that, when the House ordered the impeachment, and when the articles were exhibited, he was not an officer of the United States, but was a private citizen, etc.

It is contended by some that a citizen holding one office may be removed by impeachment for prior misdemeanors in another office. If this be sound, then the plea to the jurisdiction set up new matter; that is, that he was not in any office. Some of the articles of impeachment did not show that he was out of office as Secretary of War, and none of them averred that he was a private citizen. To this plea the House of Representatives replied double; first, that he was Secretary of War when the acts complained of were done, and continued in such office "down to the 2d of March, 1876;" second, that he was in such office "until and including the 2d day of March, 1876," and until the House, by its committee, had completed an investigation, etc.

At this point Mr. Roscoe Conkling, of New York, interposed to say that this reply of the House was a replication.

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[52] First session Forty-fourth Congress, Senate Journal, pp. 925–927; Record of trial, pp. 19–27.

[53] Record of trial, p. 19.

[54] T. W. Ferry, of Michigan, President pro tempore.

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Mr. Carpenter (continuing) said:

Certainly, and so they call it.

To the first replication the respondent interposed a demurrer; found on page 8 of printed proceedings. And the managers filed a joinder in demurrer; found on page 9.

The honorable manager [Mr. Hoar] now claims that the first replication was a demurrer. An inspection will show that it was not. It does not object to the plea as insufficient in matter of law, but because of certain facts therein set forth. We demurred to this replication, and they joined in demurrer.

If all the pleadings subsequent to the articles of impeachment are regarded as immaterial, then the substance of the matter is, we have demurred to the articles. And a demurrer to the articles is an affirmative assertion that, conceding the truth of the matters therein contained, they are insufficient in law; and upon this proposition we hold the affirmative.

Mr. Carpenter also said:

There is no question as to what is the rule in the courts of law. There it is well settled that the party demurring has the right to open and close the argument. The rules of pleading and proceeding in the ordinary courts of justice, no less than the great canons of the common law, have resulted from centuries of practical experience in the administration of justice, and have been approved by the sages of the law as the best methods to elicit truth and administer justice. If these rules are wisely devised to insure these ends, why should they be departed from in this trial? Is there other motive here than to ascertain the truth and do justice? One of two things is clear; those rules should be observed here or abolished there. It is impossible to maintain that one system of procedure will secure justice in one tribunal and produce injustice in another. And the question is whether the methods which have been established, and from time to time improved, in the courts of law, which are in almost continuous session and dealing with endless variety of causes, are less reliable than rules which might be adopted in a court like this which sits only occasionally after long intervals, and where the personnel of the court is likely to be wholly changed between one trial and another.

Mr. Montgomery Blair, also of counsel for the respondent, said:

The first to which I will call the attention of the Senate is the case of Barnard, with which the managers have shown their familiarity, having referred to it in connection with this plea in abatement. Throughout that case the rule which obtains in courts of justice was adhered to, that counsel who maintained the affirmative of the issue had the opening and reply upon such issue. I would also say—and I am making my remarks very brief—in regard to the affirmative of the issue that this is substantially a demurrer to the articles, because every lawyer knows that in a proceeding like this the articles themselves must allege all the facts necessary to give the jurisdiction in the case alleged and proved. This court of impeachment is a court of limited jurisdiction under the Constitution, and in every court of that character the facts upon which the jurisdiction rests must appear on the complaint by which the case is initiated and inviting the action of the court.

Now, every party demurring has the opening and closing, and the argument which is addressed to the court on the other side, that, as they have the affirmative of the general issue, therefore they ought to be heard in opening and replying upon all the questions arising in the progress of the case, would with equal propriety give the plaintiff in every other court the reply on all such questions, whether applied to a question of law or a question of fact. But that is not the rule. In this case we demur, and thus say that, assuming all the facts alleged to be true, the House of Representatives has no case. That is an affirmative proposition that no impeachment can be maintained on the facts charged, and therefore we are entitled to the opening and conclusion of the argument.

Mr. Manager George F. Hoar, on the other hand, contended:

I desire for one moment to call the attention of the Senate to the fact that the managers undertake here the affirmative of this issue. It is true that the respondent has interposed what he calls a plea to the jurisdiction, and that the jurisdictional question has been raised by making an issue upon that plea; but that is a matter of form and not of substance. If the counsel for the respondent

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had seen fit to enter a general plea of "not guilty," the question of the jurisdiction of the Senate to try and convict would have been involved in the final vote upon that question. To show the jurisdiction of the court over the subject-matter of the inquiry is a part of the affirmative issue involved in the presentment of articles. So that by the logic of ordinary practice we are brought to the same result as we should be if it were not a question of the prerogative of the House, and the accustomed and well-settled methods of proceeding in impeachment.

* * * * * * *

The substance of this issue is this: The House of Representatives say the defendant did certain acts as Secretary of War, and remained Secretary of War until the 2d day of March. The defendant replies, "I was not Secretary of War when you presented your articles, or before," leaving it ambiguous whether he means never before, or that there was a time before when he did not hold the office. In order not to be entangled by that ambiguity, the House of Representatives say, "We mean to assert, as we said before, that you were Secretary of War down to the 2d day of March; and the fact that you have gone out since (which is the only fact, as we understand the pleadings, now newly set up by you) is not a sufficient answer to our original article."

* * * * * * *

I understand that the question which the Senate ought to determine is this—this is the substance of the whole thing: Is the fact newly affirmed, and first affirmed by this respondent, to wit, the fact that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to the charge? You can not escape that simple proposition. That is what you have got to try: Is the fact newly set up by the defendant, that he had ceased to be Secretary of War when these articles were presented, a sufficient answer to this charge? He sets that up and the House of Representatives say that is no sufficient answer; and that is a demurrer in substance and in fact; and on the question whether a fact so set up by my antagonist newly, for the first time in the case, is a sufficient answer to what I have said, I am always entitled to the opening and close.

The House of Representatives, in the first instance, allege in the original articles:

"ART. 3. That said William W. Belknap was Sercetary of War of the United States of America before and during the month of October, 1870, and continued in office as such Secretary of War until the 2d day of March, 1876."

Now, if the Senate will be good enough to observe the plea, which was put in by the honorable counsel, it is this:

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States."

In that replication there is an ambiguity. If the respondent had said that at the time of the presentment of the articles of impeachment he was not a civil officer, it would have presented the naked question of jurisdiction without ambiguity or difficulty, and the House would have demurred; but he inserts the word "before." That may have one of two meanings. It may amount to an allegation that he was never, before the original articles of impeachment were presented, a civil officer of the United States. I do not say that that astute purpose was in the mind of the counsel who drew the pleading. If we had demurred simply, if we had made a simple demurrer, the respondent might then have come before the Senate and argued that he had responded to the articles that he never was a civil officer of the United States at any time before they were presented, and we should have been left to a discussion upon the verbiage of the article and to the danger of being excluded from court by a blunder in not giving the proper construction to the defendant's language. Accordingly, we set up no new matter, but we simply reassign, in regard to the fact which is left doubtful on the expression of the defendant's plea, what we said in our original articles: in other words, we say, "We mean to say that you were a civil officer of the United States until the 2d of March; and therefore, that being the meaning of our original article, your plea presents no legal or proper response." It is a case, therefore, of a reassignment or a reaffirmation of a fact originally set forth in a mode in which the

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meaning of the original allegation can not be questioned, and saying that, therefore, that fact being considered, the plea of the respondent shows no answer in law. Thus we have presented to the Senate in substance an issue made here in this way—a statement of the original articles that the defendant was a civil officer of the United States down to the 2d day of March, reaffirmed in the replication; a statement by the defendant that before these articles were presented he had ceased to be such civil officer; and a statement on the part of the House of Representatives that that last allegation is no defense to the charge; in other words, a simple demurrer to what is pleaded and well pleaded in the original article; and on such demurrer by the invariable rule of courts both of law and equity the party sustaining the demurrer has the affirmative.

Upon the larger question (setting aside now the pleadings and taking the substance of the issue upon the question of jurisdiction) the plaintiff always has the affirmative. If the respondent had contented himself with introducing a naked plea of "not guilty," he could have availed himself of his objection to the jurisdiction upon that plea, and it would have required the judgment of the court to be given against him or in his favor, without setting up the fact at all, because the original articles do not allege that at the time of the presenting of the articles he was a civil officer of the United States.

And it may be proper to say one further word in conclusion. I understand, in accordance, as was suggested in the very significant question put I think by the honorable Senator from New York, that the true rule of pleading in impeachment cases is this: The House of Representatives present articles setting up the substance of the transaction on which they rely, not in the form of an indictment or of a bill in equity or of a civil declaration certain to a certain intent in general, but setting forth the substance of a transaction. It is not necessary to give dates. You may say "on or about the time." It is not necessary to give legal results or intendments. Then the defendant comes in and in his answer either denies the whole matter if there was no such transaction as is set up, or if there was a transaction of the kind, but an innocent and not a guilty one, with certain different and other circumstances, he tells the story as he alleges it to be, setting up at the same time all special suggestions of law or of defense of fact on which he relies; and the pleadings are made up in that way by a joinder of issue. I do not think it is in the power of parties by pleadings of fact such as take place in ordinary courts of law to compel the Senate to determine, except in its discretion, several issues of fact in succession. Suppose an issue of fact were made up on this question of jurisdiction, is the Senate to be compelled to lay aside its legislative business and determine that, and then the defendant answer over, perhaps setting up some other matter strictly in bar, and have that determined, and so the Senate put to a trial of half a dozen successive issues of fact? I respectfully submit that that is not the rule, but that the proper method of pleading is the one which I have first stated.

Undoubtedly it would have been very proper that the matter set up in this second replication should have been set up in the original articles; but it is also well settled in matters of impeachment that the House of Representatives has in its discretion the right at any time to file additional articles if it see fit. It is also true that this new matter set up in the second replication has been pleaded to without objection on the part of the defendant; that it is before the Senate as an allegation in the cause presented by the authority of the House; and whether it should or should not have been originally inserted in the articles becomes now of no consequence.

(2) As to the American precedents, Mr. Manager Hoar said:

This question arose in the trial of President Johnson, and with the leave of the Senate I will cite that authority and the English authority on which the Senate then based its action. After a discussion of a question of practice which came up, as to the course of proceeding in the trial, the Chief Justice, then presiding in the Senate, after the managers for the House had closed what they had to say, inquired of the counsel for the President respondent whether they desired to reply to what had been said by the managers, and the managers representing the House interposed with this suggestion:

"Mr. Manager BINGHAM. Mr. President, with all respect touching the suggestion just made by the Presiding Officer of the Senate, I beg leave to remind the Senate, and I am instructed to do so by my associate managers, that from time immemorial in proceedings of this kind the right of the Commons in England, and of the Representatives of the people in the United States, to close the debate

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has not been by any rule settled against them. On the contrary, in Lord Melville's case—"

And this, I believe, is the last case of impeachment which has taken place in England—"if I may be allowed and pardoned for making reference to it, the last case, I believe, reported in England, Lord Erskine presiding, when the very question was made which has now been submitted by the Presiding Officer to the Senate, one of the managers of the House of Commons arose in his place and said that he owed it to the Commons to protest against the immemorial usage being denied to the Commons of England to be heard in reply to whatever might be said on behalf of the accused at the bar of the Peers. In that case the language of the manager, Mr. Giles, was:

"My lords, it was not my intention to trouble your lordships with any observations upon the arguments you have heard; and if I now do so, it is only for the sake of insisting upon and maintaining that right which the Commons contend is their acknowledged and undoubted privilege, the right of being heard after the counsel for the defendant has made his observations in reply. It has been invariably admitted when required.' (29 State Trials, p. 762, 44–46 George III.)

"Lord Erskine 'responded the right of the Commons to reply was never doubted or disputed.'

"Following the suggestion of the learned gentleman who has just taken his seat, I believe that when that utterance was made it had been the continued rule in England for nearly five hundred years.

"In this tribunal, in the first case of impeachment that ever was tried before the Senate of the United States under the Constitution (I refer to the case of Blount), the Senate will see by a reference to it that although the accused had the affirmative of the issue, although he interposed a plea to the jurisdiction, the argument was closed in the case by the manager of the House, Mr. Harper."

In response to that claim, the distinguished and able counsel for the President, who, I need not remind many of the most distinguished Members of this body, fought every inch of ground, yielded to the demand; and throughout the President's trial, from that time, the House of Representatives was heard in reply upon every question that arose, whether a question of the admission of evidence, of the proceedings, or the final question, following therein the English precedents for five hundred years and the precedent adopted in the first case of impeachment in the Senate, and acting therein also in accordance with what, so far as I have been able to examine, has been the proceeding in every case of impeachment in a State tribunal in this country.

* * * * * * *

In the Blount trial, I believe I have stated with sufficient distinctness, the plea being that William Blount was a Senator of the United States, and therefore not an impeachable civil officer, and also that he had laid down his office before the proceedings were instituted—upon that issue, which presented simply the question of jurisdiction, the opening and close were with the House.

* * * * * * *

Blount's case was the case to which I referred. In the haste of replying to the learned counsel I used the phrase, "the rule settled by itself for the Senate in the first case which came before them." In point of fact, it appears upon the report that the order of proceeding was settled by the four distinguished counselors who took part in it by an agreement, and there is no vote or other express action of the Senate to be found; and it was my purpose, on the suggestion of one of my honored associates, to have made that explanation to the Senate at this time, but it passed from my mind. But Blount's case seems to me to be a very significant and important authority, for it is not credible that those four lawyers, four as able lawyers as the bar of the United States afforded at that time, Mr. Jared Ingersoll, Mr. Bayard, Mr. Harper, and Mr. Dallas, would have conceded so important an advantage to the managers on the part of the House of Representatives without any equivalent, unless they had understood the practice to be so.

* * * * * * *

I speak at this moment only from memory, but I do not understand that the learned counsel correctly states the only American precedent to which he has referred—the case of Barnard. In Barnard's case a plea was interposed to the jurisdiction, in substance the same plea which is interposed here, applying to several of the articles. That plea was argued by itself, and upon that argument the counsel for the State had the opening and the close.

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On the other hand, Mr. Carpenter said:

In Blount's trial the House of Representatives had interposed the first demurrer, and therefore the managers were entitled to open and close the argument. In the report of that case (2 Annals of Congress, p. 2248), it is said:

"Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers."

That is, the managers and the counsel for the defendant, being good lawyers, were agreed that the managers were entitled to open and close the argument upon the demurrer interposed by them. Such is the rule in all courts of justice. And yet the honorable manager [Mr. Hoar] refers to this understanding between counsel as to the rights of the managers, in that case, to show that the managers, in all cases, are entitled to open and close the argument upon a demurrer interposed by the defendant; which would be exactly the reverse of the rule in courts of law.

Indeed, the broad proposition is maintained by the honorable manager that in the argument of every question to arise in this case, upon every motion made by either side, and upon every demurrer, no matter by which side interposed, the managers are entitled to the opening and close. And I understood him to contend at your last sitting that this was conceded by the eminent counsel who defended the impeachment against President Johnson, when the question was first raised by Mr. Manager Bingham; and that the court and counsel on both sides thereafter proceeded on that hypothesis.

But an examination of the report of that trial shows that the honorable manager was under a total misapprehension. I read from page 77 of the first volume of the Congressional edition of that trial:

"Mr. Howard and Mr. Manager Bingham rose at the same time.

"The CHIEF JUSTICE. The Senator from Michigan.

"Mr. Manager BINGHAM. On the part of the managers I beg to respond to what has just been said.

"Mr. HOWARD. I beg to call the attention of the President to the rules that govern the body.

"Mr. Manager BINGHAM. I will only say that we have used but thirty-five of the minutes of the time allowed us under the rule.

"The CHIEF JUSTICE. The Chair announced at the last sitting that he would not undertake to restrict counsel as to number—

They had been restricted as to time—

"without the further order of the Senate, the rule not being very intelligible to him. He will state further that when counsel make a motion to the court, the counsel who makes the motion has invariably the right to close the argument upon it.

"Several SENATORS. Certainly."

Mr. Bingham, however, wished to be heard, and by unanimous consent was heard, just as this body, unquestionably, by unanimous consent would hear any manager on this honorable board who might ask such indulgence. So Mr. Bingham was heard. It is true that in his remarks he set up this unwarrantable claim, which has been repeated by his successor, that the House of Representatives had the right to close every argument whether they had the affirmative of the particular issue or not; but the silence with which the Senate listened leads me to infer that they were perfectly satisfied with the ruling of the Chief Justice, made before Mr. Bingham took the floor, and never recalled, and which was supported by "several Senators" answering from their places "certainly." No vote was taken on the question. It was an interlocutory question; I believe a motion by the defendant for additional time to answer.

The Chief Justice ruled emphatically that whichever party made a motion, the counsel who made it had invariably the right to close the argument upon it, and several Senators responded "certainly." And nothing occurred to show that the remarks of Mr. Bingham affected the opinion of the Chief Justice or of the Senators who responded in approval. Certainly the ruling was not changed.

(3) As to the English precedents, Mr. Manager Hoar said:

I understand that the rules of proceedings upon impeachment are not governed by the principles or precedents of ordinary criminal courts. The House of Lords or the Senate sitting as a court of impeachment undoubtedly derives great light in the application of the principles of common justice and of law from the sages of the law; but nevertheless impeachment is a proceeding which stands on its

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own constitutional ground. It is an investigation into the guilt of great public offenders abusing official trusts by the legislative bodies of the country where that practice prevails. In that investigation, as everywhere else, those legislative bodies are equals. Neither branch of the American Congress stands as a suitor at the bar of the other; neither branch of the British Parliament stands as a suitor at the bar of the other; but the concurrent judgment of the two branches is necessary to an impeachment, just as the concurrent judgment of the two branches is necessary to an act of legislation. In the English Parliament the House of Commons brings to the bar of the Lords every bill which it passes, and requests the assent of the Lords thereto, just as in the English Parliament the House of Commons brings to the bar of the House of Lords the fact that it has ascertained the guilt of a great public offender in the course of its official duty, and asks the judgment of the House of Lords as to his guilt and his punishment.

It is an absolutely settled principle of right that upon all questions which arise in the trial of an impeachment the House of Commons has the right to reply. It is a principle which has existed in England for four hundred years, which, when the term "impeachment" is used in our Constitution in clothing this body with one of its highest functions, was imported, as all the other constitutional attendants of an impeachment were imported, except where they are expressly varied by the Constitution itself.

* * * * * * *

But the burden and the duty is on us of providing that charge according to the precedents of this Senate and of all senates, according to the precedents of the House of Lords in England sitting as a court of impeachment, and not according to the precedents of police courts or inferior courts of any other kind sitting anywhere. And the precedents of this Senate and of all senates sitting as a court of impeachment have adopted the rule practiced upon in the English House of Lords, from which impeachments come, for five hundred years, that on all questions the party instituting the proceeding and having the burden of proof throughout the whole issue has the right to reply. That is the proposition, and to that proposition no answer whatever has been vouchsafed or suggested by the honorable counsel for the defendant.

The further proposition, to which no reply has been suggested, was that in this particular on this special issue now made up, the precedent of this Senate and of all senates sitting as a court of impeachment precisely corresponds and agrees with the precedents of all courts whatever, that where a plea to the jurisdiction is interposed and to that plea a demurrer is filed, which—leaving out now this second matter of fact—is the question here, the party demurring has the affirmative and the reply in support of his demurrer.

* * * * * * *

In regard to the English precedent, I beg leave respectfully to refer honorable Senators to a report of which Mr. Burke is the author from a committee appointed by the House of Commons to inspect the journals of the Lords with a view of ascertaining the occasion of the great delay which had happened in the trial of Warren Hastings. This inspection and report were made in the seventh year of that trial. Mr. Burke makes in this report a most ample and thorough discussion of the entire procedure in cases of impeachment in Parliament. He begins by considering the matter of pleadings and the matter of evidence and other matters of procedure, and states in the fullest manner the principle upon which the claim of the managers rested. I do not mean to say that he states anything in regard to this particular question of the opening and close. The report is silent upon that particular subject, but he states the doctrine. He begins by saying:

"Your committee finds that the Lords, in matter of appeal or impeachment in Parliament, are not of right obliged to proceed according to the course or rules of the Roman civil law, or by those of the law or usage of any of the inferior courts in Westminister Hall, but by the law and usage of Parliament."

Then he cites various precedents from the earliest times, and finds that always the court proceed according to the law and usage of Parliament. Then he cites Lord Coke:

"As every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, etc., so the high court of Parliament, suis propriis legibus et consuetudinibus subsistit. It is by the lex et consuetudo parliamenti that all weighty matters in any parliament moved, concerning the peers of the realm, or Commons in Par-

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liament assembled, ought to be determined, adjudged, and discussed by the course of the Parliament and not by the civil law, nor yet by the common laws of this realm used in more inferior courts.

"This is the reason that judges ought not to give any opinion of a matter of Parliament, because it is not to be decided by the common laws, but secundum legem et consuetudinem parliamenti; and so the judges in divers Parliaments have confessed."

Then he goes on under the "rule of pleading:"

"Your committee do not find that any rules of pleading as observed in the inferior courts have ever obtained in the proceedings of the high court of Parliament in a cause or matter in which the whole procedure has been within their original jurisdiction. Nor does your committee find that any demurrer or exception, as of false or erroneous pleadings, hath been ever admitted to any impeachment in Parliament, as not coming within the form of the pleading; and, although a reservation or protest is made by the defendant—matter of form, as we conceive—'to the generality, uncertainty, and insufficiency of the articles of impeachment,' yet no objections have in fact been ever made in any part of the record."

I do not think it is worth while to detain the Senate with reading very full and copious extracts from this report. I will take the liberty of placing the book where it will be reached by Senators when they discuss this question.

Taking the other view, Mr. Carpenter said:

In the next place, whatever may be the precedents in the House of Lords in trying an impeachment, we have the authority of the honorable manager himself who has just taken his seat that they are not binding at all in a trial of impeachment under our Constitution. In the debate which took place in the House (if it can be called a debate where nobody was allowed to speak) as to the ordering of the impeachment, the honorable manager himself stated that the British rules were not applicable, and consequently no aid could be drawn from the trial of Warren Hastings. Now I submit that whatever may have been the rule in the trial of impeachments in England this court should make its own rule, and that should be the rule of right and justice.

I deny, as respectfully as a man may deny anything that comes from a coordinate branch of this Congress, that the House appears here in any other attitude than we appear here, a suitor in this cause. Is it possible, where the Constitution says we are to have a trial, and the House of Representatives presents itself here as the accuser, that it is a part of the court; that it is entitled to any favor here that we are not entitled to? The rule uniformly adopted by the courts of law is a rule which the experience of hundreds of years has determined to be wise and proper, and that is the rule which I understand this Senate has ordered for this trial.

And Mr. Montgomery Blair argued:

It is altogether a mistake, also, that this proceeding was ever otherwise considered here or in England as standing upon any different footing in its general principles than any other proceedings at law Woodeson, in his lecture on the subject of impeachment (volume 2, page 596), treats it as a suit. His language is that "the House of Commons, as the grand inquest of the nation, become suitors for penal justice." Wilson in his Parliamentary Law speaks of the articles as analogous to an indictment, and hence the rules of practice ought to conform to those of the courts in analogous circumstances, and if they vary from them in England, it does not follow a practice there which does not conform to the general principles recognized here. We have greatly restricted the impeachment proceeding; it is not the proceeding here as there in many of its essential features.

In conclusion, Mr. Carpenter quoted from Cushing's Law and Practice of Legislative Assemblies.

Mr. Joseph E. McDonald, of Indiana, moved to rescind the order giving the opening and closing to the counsel for the respondent.

Mr. A. S. Merrimon, of North Carolina, asked this question:

Do the managers claim to reply in the discussion of all questions, as a matter of right, or only on the ground of practice, which the court may in its sound discretion rightfully change?

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Mr. Manager Hoar replied:

I respectfully reply to that question that we do not concede that whatever be the constitutional and lawful prerogatives of the House of Representatives in this regard can be rightfully changed without the assent of the House itself.

The Senate, by a vote of 40 yeas, 18 nays, voted to retire for consultation.

Having retired, the question recurred on the motion of Mr. McDonald, which was decided in the negative; yeas 20, nays 34.

Thereupon, on motion of Mr. George S. Boutwell, of Massachusetts, it was—

Ordered, That four managers on the part of the House of Representatives may be allowed to submit arguments upon the question whether the respondent is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office, and whether the issues of the fact presented in the pleadings are material, and also whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

And then, the Senate having returned to its chamber, the President pro tempore said:

The presiding officer is directed to state that the motion to reconsider the vote by which the order of argument was made is overruled, and also to state that an order is made granting the request of the managers on the part of the House that four of the managers be permitted to argue the case.

2139. On July 7, 1876,[55] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question arose as to the admissibility of certain testimony.

Mr. Manager John A. McMahon, who had objected to the testimony, claimed the right as the objector to the opening and closing of the argument, but offered to waive the opening.

Mr. Matt. H. Carpenter, of counsel for the respondent, admitted the right claimed, and insisted that the managers should exercise it.

Thereupon Mr. McMahon argued, and was followed by Mr. Carpenter. Then Mr. Manager George A. Jenks closed.

2140. Instance of action by the Senate as to improper language used by counsel for respondent in an impeachment trial.

The presiding officer at an impeachment trial exercises authority to call to order counsel using improper language.

On April 29, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, and during the final arguments in the case, Mr. Charles Sumner, a Senator from Massachusetts, offered the following:

Whereas Mr. Nelson, one of the counsel for the President, in addressing the Senate, has used disorderly words, as follows, namely: Beginning with personalities directed to one of the managers he proceeded to say, "So far as any question that the gentleman desires to make of a personal character with me is concerned, this is not the place to make it. Let him make it elsewhere if he desires to do it:" and whereas such language, besides to fight a duel, contrary to law and good morals: Therefore,

Ordered, That Mr. Nelson, one of the counsel of the President, has justly deserved the disapprobation of the Senate.

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[55] First session Forty-fourth Congress, Record of trial, pp. 192, 193.
[56] Second session Fortieth Congress, Senate Journal, p. 927; Globe supplement, p. 341.

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The Chief Justice [57] said that the proposition of Mr. Sumner was not before the Senate if objected to.

Mr. John Sherman, of Ohio, thereupon objected.

Mr. Manager Benjamin F. Butler, who was the manager referred to, asked that no further action be taken in regard to the language referred to.

On April 30,[57] the proposition came before the Senate sitting for the trial.

Pending consideration, Mr. Henry B. Anthony, of Rhode Island, asked Mr. Nelson if he intended by the language to challenge the manager to a duel.

Mr. Nelson said that he did not particularly have a duel in mind. He simply resented a charge by the manager, and he had no idea of insulting the Senate.

Mr. Reverdy Johnson, of Maryland, moved that the proposition lie on the table, and the motion was agreed to; yeas 35, nays 10.

2141. On June 16, 1876,[58] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, offered a paper in the nature of a plea that the proceeding be dismissed because the Senate had affirmed its jurisdiction of the case by less than a two-thirds vote.

Objection arose to placing the paper on file, whereupon Mr. Black said:

> Mr. President, we offer a paper asserting our legal and constitutional rights, as we understand them. A Senator rises and says he objects; a manager rises and says he objects. Is that a reason for simply throwing it under the table? Is there not to be some reason given for such a thing as that? What is to be done with this? Walk over us I admit you can, if a majority see proper to do so. They can do as they please; they can order it to be thrown under the table; but some little respect ought to be shown a man who is struggling for his liberty and his reputation——

Mr. George F. Edmunds, a Senator from Vermont, interrupting, said:

> I call the counsel to order. I do not think that the language he is addressing to the Chair is fit to be addressed to this court.

The President pro tempore [59] said:

> Counsel will use language which is proper and decorous. * * * The counsel will proceed, using proper language. The Chair will call him to order if he does not use proper language.

2142. It was held that a motion relating to the sitting of the Senate in an impeachment trial might be argued by counsel.—Only July 7, 1876,[60] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, moved that the Senate take a recess until 7:30 p.m. for the purpose of an evening session.

Mr. Matt H. Carpenter, of counsel for the respondent, was making an appeal against an evening session, when Mr. Edmunds raised the question of order that on a question of this kind of counsel were not entitled to be heard.

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[57] Senate Journal, p. 928; Globe Supplement, pp. 350, 351.
[58] First session Forty-fourth Congress, Record of trial, p. 170.
[59] T. W. Ferry, of Michigan, President pro tempore.
[60] First session Forty-fourth Congress, Record of trial, p. 202.

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The President pro tempore [59] overruled the point of order.

Thereupon Mr. Carpenter made his protest, and the Senate decided the motion of Mr. Edmunds in the negative.

2143. In arguing in an impeachment trial counsel take position under direction of the Senate.—On July 25, 1876,[61] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, was about to address the Senate in the final summing up, when Mr. John A. Logan, a Senator from Illinois, said:

Before the counsel proceeds, I will state that I have heard some complaints made about the position that the counsel and managers have to occupy in the presence of the Senate. I therefore suggest that the counsel be allowed to occupy any position he desires from which to address the Senate.

Thereupon, by unanimous consent, Mr. Carpenter was permitted to stand in the outer tier of seats.

2144. Instance wherein a manager was permitted to move a change of the rules governing the Senate in impeachment trials.—On April 11, 1868,[62] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager John A. Bingham, on behalf of the managers, moved in the Senate for a change in one of the rules governing the trial.

This motion was entertained.

2145. Instance wherein the managers of an impeachment declined to answer a question propounded by a Senator during the trial.—On April 1, 1868,[63] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was under examination. Counsel for the President objected to a question tending to elicit from witness the substance of a conversation with General Thomas, and statements of the latter as to the means by which the President proposed to obtain possession of the war office.

In the course of the discussion as to the admissibility of the question, Mr. Reverdy Johnson, Senator from Maryland, propounded the following:

The honorable managers are requested to say whether evidence hereafter will be produced to show—

First. That the President, before the time when the declarations of Thomas, which they propose to prove, were made, authorized him to obtain possession of the office by force or threats, or intimidation, if necessary; or,

Secondly, If not, that the President had knowledge that such declarations had been made and approved of them.

To which Mr. Manager John A. Bingham replied:

I am instructed by my associates to say—and I am in accord in judgment with them, Mr. President—that we do not deem it our duty to make answer to so general a question as that; and it will certainly occur to the Senate why we should not make answer to it.

2146. During an impeachment trial the managers and counsel for the respondent are required to rise and address the Chair before speaking.—On July 7, 1876,[64] in the Senate sitting for the

[61] First session Forty-fourth Congress, Record of trial, pp. 318, 319.
[62] Second session Fortieth Congress, Globe supplement, p. 147.
[63] Second session Fortieth Congress, Globe supplement, pp. 70, 71.
[64] First session Forty-fourth Congress, Record of trial, pp. 190, 191.

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impeachment of trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, and Mr. Matt. H. Carpenter, of counsel for the respondent, were engaged in a colloquy, when the President pro tempore [65] said:

The Chair will remind the gentlemen that they must rise to speak, and address the Chair. The Chair will insist upon it. * * * The Chair will again remind gentlemen, and hopes he does it for the last time, that the counsel as well as the managers should address the Presiding Officer, that he may maintain the rights of the parties. It is due to the Senate that it should be done; and the duty of the Chair demands it to protect the respect due to the Senate. The Chair will state, also, that he will not recognize a gentleman on either side unless he does rise and address the Presiding Officer.

2147. During an impeachment trial a proposition by managers or counsel is not amendable by Senators, but yields precedence to one made by a Senator.

A proposition offered by a Senator during an impeachment trial is amendable by Senators, but not by managers or counsel.

On June 6, 1876,[66] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a proposition fixing the time for the hearing of evidence on the merits was under discussion, and motions were offered by the managers for the House of Representatives, by the counsel for the respondent, and by Senators. A question arising as to amendment and precedence the President pro tempore [67] said:

The Chair has ruled that a proposition made by managers or counsel is not amendable by Senators; but any proposition made by a Senator is amendable by a Senator, nor can the proposition made by Senators be amended by the counsel or managers. A motion made by a Senator has priority of one offered by the managers or the counsel.

2148. During an impeachment trial an order proposed by a Senator is debatable by managers and counsel, but not by Senators.—On June 1, 1876,[68] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. William Pinckney Whyte, a Senator from Maryland, offered an order fixing the time for further pleadings on behalf of the respondent. Mr. Matt. H. Carpenter, of counsel for the respondent, and Mr. Manager Scott Lord, on behalf of the House of Representatives, discussed the proposed order at some length.

Thereupon Mr. Allen G. Thurman, a Senator from Ohio, proposed to address the Senate.

The President pro tempore [1] reminded him that debate was not in order:

Mr. Thurman said:

I do not wish to debate, but I want to know the rule of the Senate on this subject. I want to know whether there is to be an unlimited discussion of counsel and managers on every order that is offered by a Senator. In my judgment it is all irregular.

The President pro tempore said:

The Chair will state in reply to the Senator from Ohio that the Chair was holding under the rule that each of the parties is entitled to one hour's debate on any motion or order submitted.

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[65] T. W. Ferry, of Michigan, President pro tempore.
[66] First session Forty-fourth Congress, Record of trial, p. 166.
[67] T. W. Ferry, of Michigan, President pro tempore.
[68] First session Forty-fourth Congress, Record of trial, p. 160.

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2149. During the Peck impeachment trial the respondent assisted his counsel in examining witnesses, in argument on incidental questions, etc.—On January 11, 1831,[69] in the high court of impeachment during the trial of the case of the United States *v.* James H. Peck, the respondent, who was United States district judge of Missouri, assisted his counsel, personally addressing the court to offer documentary evidence, to explain testimony which he proposed to offer, to propound questions to the witness, to make a statement supplementary to the testimony of a witness, and to argue as to the admissibility of certain testimony.

2150. Delays in the Johnson trial caused by illness of counsel for respondent were the occasion of protest on the part of the managers and of action by the Senate.—On April 16, 1868,[70] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. William M. Evarts, of counsel for the President, announced that the defense had reached a point where it would not be convenient to produce any more testimony on this day. On April 14 the Senate had adjourned because of the illness of Mr. Henry Stanbery, of counsel for the respondent, and on April 15 the proceedings had been modified somewhat because of his continued illness. He was still absent on the 16th, when Mr. Evarts, after introducing considerable testimony made announcement as above stated.

This caused a protest from Mr. Manager Benjamin F. Butler, in the course of which he said:

> We adjourned early on Monday, as you remember, and on the next day there was an adjournment almost immeditely after the Senate met because of the learned Attorney-General. Now, all we ask is that this case may go on.
>
> If it be said that we are hard in our demands that this trial go on, let me contrast for a moment this case with a great State trial in England, at which were present Lord Chief Justice Eyre, Lord Chief Baron McDonald, Baron Hotham, Mr. Justice Buller, Sir Nash Grose, Mr. Justice Lawrence, and others of Her Majesty's judges in the trial of Thomas Hardy for treason. There the court sat from 9 o'clock in the morning until 1 o'clock at night, and they thus sat there from Tuesday until Friday night at 1 o'clock, and then, when Mr. Erskine, aftewards Lord Chancellor Erskine, asked of that court that they would not come in so early by an hour the next day because he was unwell and wanted time, the court after argument refused it, and would not give him even that hour in which to reflect upon his opening which he was to make, and which occupied nine hours in its delivery, until the jury asked it, and then they gave him but a single hour, although he said upon his honor to the court that every night he had not got to his house until between 2 and 3 o'clock in the morning, and he was regularly in court at 9 o'clock on the following morning.
>
> That is the way cases of great consequence are tried in England. That is the way other courts sit. I am not complaining here, Senators, understand me. I am only contrasting the delays given, the kindnesses shown, the courtesies extended in this greatest of all cases, and where the greatest interests are at stake, compared with every other case ever tried elsewhere. The managers are ready. We have been ready; at all hazards and sacrifices we would be ready. We only ask that now the counsel for the President shall be likewise ready, and go on without these interminable delays with which when the House began this impeachment the friends of the President there rose up and threatened.

At the conclusion of Mr. Butler's remarks, Mr. John Conness, Senator from California, offered this order:

> *Ordered*, That on each day hereafter the Senate sitting as a court of impeachment shall meet at 11 o'clock a.m.

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[69] Second session Twenty-first Congress, Report of trial of James H. Peck, pp. 267–272.
[70] Second session Fortieth Congress, Globe Supplement, pp. 208, 209; Senate Journal, pp. 906, 907.

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Mr. Charles Sumner proposed the following as a substitute therefor:

That, considering the public interests which suffer from the delay of this trial, and in pursuance of the order already adopted to proceed with all convenient dispatch, the Senate will sit from 10 o'clock in the forenoon to 6 o'clock in the afternoon, with such brief recess as may be ordered.

Under the ruling the proposed order went over to April 17 for consideration, when Mr. Sumner's proposed substitute was disagreed to, yeas 13, nays 30. The original order offered by Mr. Conness was then agreed to, yeas 29, nays 14.

The Senate had heretofore met at 12 m. under the rule.

2151. Instance during an impeachment trial wherein the Presiding Officer admonished managers and counsel not to waste time.—On February 15, 1905,[70a] in the Senate sitting for the impeachment trial of Judge Charles Swayne, in the course of the introduction of testimony, the Presiding Officer [70b] said:

While the Presiding Officer makes no criticism on the course of the examination and cross-examination, he desires to say that the time of the Senate is very precious, and he hopes that there will be as little time taken by immaterial questions, either by the managers or by counsel, as possible, and that we may get along with this case.

2152. The Senate, and not the Presiding Officer, decides on a motion for attachment of a witness.

Instance wherein, during the Swayne trial, testimony was introduced to show the propriety of an attachment against an absent witness.

On February 10, 1905 [71] in the Senate sitting for the trial of Judge Charles Swayne, after the pleadings had been concluded and when the witnesses were called, Mr. Henry W. Palmer, of Pennsylvania, manager on behalf of the House of Representatives, said:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Mr. Liddon was then sworn and examined, giving testimony indicating that Mr. Durkee was able to attend.

The testimony being concluded, Mr. Palmer announced that on that showing the managers would ask for an attachment. He suggested, however, that if the counsel for respondent would consent, it could be arranged to take the deposition of the witness at his home. The counsel declined to agree to this.

Then the Presiding Officer [72] said:

The Senate will take into consideration the motion for an attachment, and decide it later on. The Presiding Officer will merely say at the present time that it seems to be understood that the witness is suffering from a serious disease, which makes it very difficult for him to travel, certainly without an attendant, and that for that reason his son, who is a physician, has been summoned. It

[70a] Third session Firty-eighth Congress, Record, p. 2625.
[70b] Orville H. Platt, of Connecticut, Presiding Officer.
[71] Third session Fifty-eighth Congress, Record, pp. 2229, 2230.
[72] Orville H. Platt, of Connecticut, Presiding Officer.

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would seem as if it were hardly required to issue an attachment until information is communicated to the Senate as to whether there is a real refusal on the part of the witness to come or whether the witness will come with his son as an attendant.

For the reason the Presiding Officer suggests that a decision of the motion be postponed, and the Sergeant-at-Arms will be instructed to ascertain whether the witness will come under the circumstances.

Later on this day, however, on a question relating to another witness, the Presiding Officer said [73]:

The rules require that a motion for an attachment shall be decided by the Senate rather than by the Presiding Officer. The Presiding Officer, however, will suggest that the motion being now made, a decision upon it can be delayed for a little time. There may be some further information. So it is not necessary to submit the question at this time to the Senate, unless it be desired.

2153. On February 13, 1905,[74] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, in respect to the application made by counsel for the respondent for an attachment against Louis P. Paquet, we desire to have the matter properly investigated as to whether the witness is really able to attend or not, and to that end we ask that the attachment may issue, and that the officer or the Sergeant-at-Arms serving the same may be charged with the discretion of determining whether the witness is able to attend or not. That is the course which has been pursued in practice with which I am familiar. In other words, where there is doubt in the mind of the court or of counsel as to whether a witness is able to attend or not, the court awaits the return of the sheriff or the marshal in the premises.

The Presiding Officer [75] said:

The sixth rule of the Senate for impeachment trials provides that motions for attachment must be decided by the Senate rather than the Presiding Officer. Whether it be necessary for the Senate to retire to consult upon this matter the Presiding Officer does not know, but he will state the motion to the Senate.

Mr. Paquet, a witness summoned for the respondent, has furnished the certificate of a physician that he has been ill since January 31, and is still ill, confined to his bed, and probably will not be able to travel for two or three weeks. Counsel for respondent now moves that an attachment may issue, and that the Sergeant-at-Arms in serving the same be authorized to use his discretion to determine whether the witness is or is not able to travel. Unless there be some motion made to retire for the consideration of this question, the Presiding Officer will submit the motion to the Senate.

Mr. John C. Spooner, a Senator from Wisconsin, said:

Mr. President, whether a witness shall be brought by an attachment or not is for the judgment of the Senate as a court, I should think, and I should like to hear it somewhat discussed, if there are authorities sustaining the proposition, that a court issues an attachment for a witness leaving it to the sheriff to determine whether the judgment of the court or the writ shall be executed or not. I should like to have the authorities produced.

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[73] Record, p. 2242.
[74] Third session Fifty-eighth Congress, Record, pp. 2459, 2460.
[75] Orville H. Platt, of Connecticut, Presiding Officer.

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After this suggestion the motion for process was temporarily withdrawn.

2154. Rule in the Swayne trial governing Senators as to colloquies and questions addressed by them to managers, counsel, or other Senators.

In the Swayne trial Senators were permitted a freedom of debate greater than usual.

On January 27, 1905,[76] in the Senate sitting for the impeachment of Judge Charles Swayne, a debate arose between Mr. Henry W. Palmer, of the managers for the House of Representatives, and Mr. J. C. S. Blackburn, a Senator from Kentucky.

The Presiding Officer said:

> The Chair wishes to observe at this point that he doubts the propriety of debate between Senators and the managers of the impeachment on the part of the House. He does not speak positively upon that question, not having had an opportunity to examine the precedents.

On February 3,[77] in the Senate sitting for the trial, Mr. Augustus O. Bacon, of Georgia, offered and the Senate agreed to an order containing the following rule:

> It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

The effect of this rule seems to have been to permit debate and suggestions by Senators. Thus on February 10[78] Mr. Joseph W. Bailey, of Texas, suggested as to testimony and debated. On February 13[79] there was extended debate of Senators on the subject of issuing processes for witnesses. On February 14[80] Mr. Porter J. McCumber, of North Dakota, and others, discussed evidence. Also on February 23,[81] on an order relating to the printing of arguments of managers, there was free debate by the Senators. Yet on an important question relating to the admissibility of testimony, arising on February 14[82] and 16, the Senate, after some debate, decided to enforce the rule providing for secret sessions. In other cases, also, the doors were closed. But during this trial Senators were permitted a greater freedom of debate than in other trials.

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[76] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.
[77] Record, p. 1819.
[78] Record, p. 2240.
[79] Record, pp. 2459, 2460.
[80] Record, p. 2532.
[81] Record, pp. 3142–3145.
[82] Record, pp. 2536–2540, 2720, 2721, 2899.

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Presentation of Testimony in an Impeachment Trial*

1. Parliamentary law as to evidence. Section 2155.[1]
2. Attendance of witnesses. Sections 2156–2160.[2]
3. Administration of oath to witnesses. Sections 2161–2164.
4. Order of introduction. Sections 2165, 2166.
5. Admission and exclusion. Section 2167.[3]
6. Examination of witnesses. Sections 2168–2175.[4]
7. Questions asked by Senators. Sections 2176–2188.
8. Instances of general practices. Sections 2189–2192.[5]
9. Rulings of presiding officer as to evidence. Sections 2193–2195.[6]
10. Debates as to admission of evidence, etc. Sections 2196–2202.
11. Privileges of witnesses. Sections 2203–2205.
12. Irrelevant evidence. Sections 2206–2208.
13. Cross-examination, rebuttal evidence, etc. Sections 2209–2217.

2155. The judgment of the Lords in impeachments is given in accordance with the law of the land.

The trial of impeachments before the Lords is governed by the legal rules of evidence.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments.

Judgment. Judgments in Parliament, for death, have been strictly guided per legem terrae, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment, nor add to it. Their sentence must be secundum, no ultra legem. (Seld. Jud., 168, 171.) This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment therefore is to be such as is warranted by legal principles or precedents. (6 Sta. Tr., 14; 2 Wood., 611.) The chancellor gives judgment in misdemeanors; the lord high steward formerly in cases of life and death. (Seld. Jud., 180.) But now the steward is deemed not necessary. (Fost., 144; 2 Wood., 613.) In misdemeanors the greatest corporal punishment hath been imprisonment. (Seld. Jud., 184.) The King's assent is necessary in capital judgments (but 2 Wood., 614, contra), but not in misdemeanors. (Seld. Jud., 136.)

*Hinds' Precedents. Vol. 3, p. 485 (1907).

[1] Rules as to evidence in Blount's case (sec. 2309) and Pickering's case (sec. 2331).

[2] Subpoenas issued by direction of a committee. Section 2463 of this volume. As to issuing process. Section 2483. Senate decides as to attachment of witness. Section 2152. Witness excused. Section 2394.

[3] Objection to evidence by a Senator. Section 2268.

[4] A person charged with impeachable offense not compelled to furnish evidence against himself. Section 2514.

[5] Exhibitions in nature of evidence not to be attached to articles. Section 2124. Briefs as to pleas to jurisdiction filed during presentation of testimony. Section 2125. Testimony not in order during voting on the articles. Section 2396.

[6] See also sections 2082–2089, 2138, 2226, 2230, 2239.

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2156. In the Belknap trial the Senate directed the managers and counsel for respondent to furnish to one another lists of the witnesses they proposed to call.

The Senate denied in the Belknap trial the application of respondent's counsel for a statement of the facts which the managers expected to prove by each witness.

Form of a motion submitted by counsel for respondent in an impeachment trial.

On June 6, 1876,[7] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, an order was made providing that on July 6, 1876, the Senate would proceed to hear the evidence on the merits of the trial in this case.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, submitted this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES
v.
WILLIAM W. BELKNAP

William W. Belknap, by his counsel, moves the court that an order be made upon the managers on the part of the House of Representatives to furnish within twenty-four hours to the accused or his counsel a list of the witnesses whom they intend to call, together with the particulars of the facts which they expect to prove by them.

It being stated on behalf of the managers that a large portion of the testimony, and especially the material testimony, had been printed, Mr. Blair said:

Of course in respect to that part of the testimony which has been printed, it is very easy to furnish it to us; but I beg leave to say that there is a large portion of the testimony taken before the Judiciary Committee of which we are not at all informed, which we have applied to the managers for copies of, but they repelled us and refused to give them to us. We do not know what part of it they may rely on at all. We have rumors of its character from the press; but we do not know what part of it they mean to rely upon, or what facts they mean to rely upon; and as we are ordered to prepare, we want to make that preparation to meet such case as they may make.

Mr. Allen G. Thurman, a Senator from Ohio, asked this question:

Is there any precedent for the order asked for, either in impeachment trials or in ordinary courts of criminal jurisdiction?

To this Mr. Jeremiah S. Black, of counsel for the respondent, replied:

No; but certainly there ought to be one made. * * * We do not go upon precedent here; that is, this application is not founded upon anything that has ever happened before. There never was a case like this before. I have never heard whether the managers object to this order or not. If they do, I can not conceive for what reason. Certainly they do not intend to keep us in ignorance of the kind of case they are going to produce against us and take us by surprise and then proceed and run over us and get a conviction against us on grounds that we have no notice of. They do not think it is unfair, I suppose, to tell us beforehand what sort of facts they intend to produce.

They have their witnesses here, or at least within easy reach. Ours are scattered all over the continent; some of them in California, others in the Indian Territory. It becomes absolutely necessary for us, as soon as we can, to get out our subpoenas for witnesses and use all diligence in bringing them here. If the trial is to go on upon the 6th of July or at any other time, even a month later than that, we will be hard pressed for time. We can not know

[7] First session Forty-fourth Congress, Senate Journal, p. 951; Record of trial, pp. 167–169.

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what particular witness we need or how many of them unless we are informed of theirs and understand that facts they mean to prove or try to prove.

I maintain, as to every public accuser, a manager of the House of Representatives, an attorney-general, or district attorney, if he has a criminal case which he intends to prosecute against a citizen, that he is bound by his duty and as a lover of justice to disclose the whole case to the defendant as fully as possible and at the earliest moment.

The gentlemen say, when we ask them for this list, that it is a secret which they have the right to keep and they will keep it until the moment of the trial and then spring it upon us, so that we shall be unable to meet it by contradiction or explanation. They wish to take us by surprise as much as possible, and convict the defendant, if they can, without giving him a chance to show his innocence. They say there is no precedent for such a call as we make upon them now. Nothing like this is found in the common-law cases. I do not know how far back they want us to go for a precedent old enough to suit them. In modern times it has never been refused. I admit that by the common law, whose authority they invoke, a man on trial in any criminal court had no chance at all for life or liberty. He was not allowed counsel. He was not allowed to call witnesses. He was not confronted with the witnesses against him. None of those privileges which are secured in our Constitution were given to a party charged with a criminal offense by the ancient common law. That common law was a bloody old beast.

Mr. Manager Scott Lord, on behalf of the House of Representatives, said:

What is the proposition which the counsel makes? It is no more and no less than this, that he has the right to invade the room of the managers, that he has the right to ascertain their course of trial, that he has the right to know every possible witness to prove a certain fact.

Sufficient it is to say that the wisdom of all the ages is against it. The learned counsel had better devote himself to answering the question of the Senator, and find whether in all the past ages a single precedent of this kind has been had in any criminal proceeding. It is not enough for him to rise here and say he did not hear the managers object. He may possibly have been out of the room. It is not enough for him to stand here and say, "We need to make a precedent in this case." It is enough for us to answer that he asks for an extraordinary precedent, extraordinary proceeding, against the wisdom of all the past, and in regard to which he can not find the first authority in rummaging through all the books of the common law and all the books relating to criminal jurisprudence. I am surprised that any such proposition should be seriously made here, that we should be compelled, in advance, to disclose to him the names of witnesses and what each witness is expected to testify to, when we have laid before him in the broadest manner every charge that we make, and one article of these articles of impeachment contains seventeen specifications.

The order proposed by counsel for respondent was disagreed to by the Senate, without division.

The Senate then agreed to this order:

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

2157. In the Belknap trial the Senate adjourned to await the attendance of a witness declared by the respondent, on oath, to be "material and necessary for his defense."

The Senate declined to postpone formally the Belknap trial to await the attendance of a witness for the respondent.

Respondent's application in the Belknap trial for delay to await a witness's arrival was not required to be accompanied by a statement as to what he would prove.

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Form of respondent's application for delay to await a witness in an impeachment trial.

On January 12, 1876,[8] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, after the testimony for the respondent had proceeded some time, Mr. Matt. H. Carpenter, of counsel for the respondent, announced that one witness whom they had asked to have summoned—John S. Evans—had not appeared. He said that his presence was necessary at this stage, and asked the Senate sitting for the trial to adjourn some reasonable time for Mr. Evans to arrive.

To this the managers on the part of the House of Representatives objected.

Mr. Manager George F. Hoar said:

I understand the rule and practice to be perfectly well settled and enforced in all courts where justice is administered according to the forms and practice of the common law that a party in a civil or criminal case applying either for a continuance or a postponement on account of the absence of a witness must show—

First. That the witness has been duly summoned;

Second. That the evidence which the witness would give if present is material and important to his cause; and,

Third. That the evidence must be so set forth that the opposite party may, if he choose, elect to admit that the witness, if present, would so testify; not to admit the fact, but that the witness, if present, would so testify; and that election is always tendered to the opposite party.

There is but one exception to the universality of that rule, which is, that where the evidence is of itself of a character which the witness only could state, that is not required of the party, as, for instance, if the question were of the construction of a dam which had been taken away, the scientific expert under whose direction that structure was built would be the only person who could describe it, and it would be impossible for the party ordinarily to say what his witness would testify to on that subject if he were present; but with that exception, of the evidence of experts where it is of such a character that the evidence could not be understood by the party who undertakes to set it forth, the rule is universal.

In the present case I fully concede that the defendant's counsel ought to stand before the Senate as if they had summoned the witness. They applied to the Senate for a subpoena. The Senate granted the order. The Sergeant-at-Arms did not execute it because, as he understood, there had been a subpoena issued already and served at the instance of the other party. So we agree that the defense stands here in all respects having used all diligence to obtain the presence of this witness; but the defendant shows no reason whatever why he should not state the evidence which Mr. Evans would give if he were present and give us an opportunity to elect to consent to that evidence. In fact, Mr. Evans, it appears, has been twice examined very fully in regard to this whole transaction before two different committees of the House. It is true that there was nobody present at that examination representing the defendant, and therefore certainly it is true that the defendant can not be sure that the facts favorable to him within Evan's knowledge were brought out in that examination. I do not overlook that. I make the concession also as fully as the learned counsel could desire. Still, either he can state what Mr. Evans would testify if he were present, and his reasons for believing that he would so testify, or he has no reason to believe that Evan's testimony would be valuable to him if he were here. He can not escape, as it seems to me, that dilemma. Either he has no reason to suppose that Mr. Evans would be more important to him than any other citizen of the United States who is at a distance of a thousand miles from this place or he can state what it is that this witness knows and would prove, and give us the opportunity to make our election.

I conceive that any distinction in practice which has grown up in State courts between a first continuance from term to term and a second continuance from

[8] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258–261.

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term to term has nothing whatever to do with this matter. This is not a court having terms. It is a court which expires with its first and only term. This is not the case of an application for a continuance of a trial made before trial. It is a case where the trial has begun and has proceeded with the full consent in this particular of both parties. The evidence is fresh in the minds of all the members of the court. This, therefore, is a simple application for the postponement of a trial which is already far advanced toward its termination.

My associate [Mr. Manager Jenks] desires me to state the case of the trial of Smith and Ogden in the circuit court of the United States, where Judge Paterson establishes the rule that I have stated.

Mr. Montgomery Blair, of counsel for the respondent, said:

It is proposed, I suppose, from this initiatory proceeding, to treat this as an application for a continuance. Everything that has been said proceeds upon the assumption that we have applied for a continuance of this case, whereas we only ask that a witness who has been duly summoned, who ought to be here now, for whose absence we are not responsible, should be allowed a reasonable time to make his appearance, being detained by freshets or some other cause for which the party defendant is not in any way responsible. We have no disposition to abuse the patience of this body. We do not expect a delay beyond the time when the Senate will be in session in the transaction of its other business. We do not expect to detain this body with any long speeches. We have evinced no disposition whatever at any time, as I may appeal to the experience of every gentleman who hears me, to abuse the patience of this body in any respect, and above all not to try any sharp practice upon this body, but to have a fair trial.

I utterly protest against the application of rules derived from other proceedings altogether to the occasion which has arisen now, which is not an application for a continuance. We only ask that this body will wait until a man who has been summoned by its order makes his appearance here so that we may proceed with our examination.

While I am up I will say, however, that my learned friend on the other side and the very learned gentleman who makes this proposition are altogether mistaken or I am in regard to the rules of practice about what terms a party is to have who makes his application for a continuance. The gentleman who is associated with me has said that on application for a second continuance under the rules of the State in which I have practiced the party is required to state what the witness is expected to prove. The practice which prevails in the circuit court of this District and in Maryland, as my learned friend who represents that State on this floor [Mr. Whyte] will bear me out, is that where a party makes an application for a continuance, and states what he expects to prove by the witness, that proof is assumed to be a fact, not that the witness has proved it, but it is assumed to be a fact, an indisputable fact, according to the practice prevailing in this District, and in Maryland, from which State we derive the practice that prevails in the District. So that if the rule is to be enforced here, and the analogy is to be taken from the practice prevailing in this District, if we state what we expect to prove by this witness, and they proceed to trial, what we expect to prove is assumed to be an undisputed fact. That is the law of this District and the practice of the courts of the United States in the District of Columbia. That is a peculiar law. It does not prevail in the other courts with which I am familiar. It does not prevail in Missouri, where I practiced a great many years; but it is a law of this District and of Maryland. So then there are differences in respect to the laws of the different States. There is no uniform law on this subject. There is no common law upon this subject. There is none here recognized by this body. This court will have to make a rule for itself, and especially will it have to make a rule for itself in a proceeding which is not a motion for a continuance, but a motion for the delay of this trial until a witness can reach here who has been duly summoned. * * *

And, in response to a question by Mr. Manager Hoar, Mr. Blair said:

The gentleman knows perfectly well that when cases are called for trial in the ordinary courts of judicature the parties are asked whether they are ready for trial, that then and there the parties announce whether they are ready or not, and that motions for continuance are made and settled before they proceed to trial. Here there has been no occasion of that kind. We have been required to go to trial on this occasion without any "ifs" or "ands" about it, whether we

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were ready or not. We have been appointed a given day to be here. We have been notified that our witnesses would be summoned, and we have had the allowance of a committee of this body to summon them. We put their names in the hands of the officer to summon them. He has summoned them; and it is not our fault that this witness is not here. The analogies of the gentleman break down. One of the most unjust things in this world is to apply false analogies. It is the most misleading of all modes of reasoning.

Mr. Jeremiah S. Black, also of counsel for the respondent, argued:

I deny utterly the rule which they lay down with so much emphasis as being the true and only rule applicable to such a case—that is, that when a party is caught with an absent witness whom he had used all diligence to get here, and who he had good reason to believe would be here—it is either fair or just or law to push him forward or make him show the specific testimony which the witness would give if he were here, unless there be some reason to doubt the good faith of the application or the materiality of the witness, supposing him to be here.

The managers have produced a book, The Trials of Smith and Ogden. There the counsel for the accused asked for the continuance of the cause until they should be able to get certain witnesses from Washington, to which it was objected that they had not stated what specific facts the witnesses would prove if they were present in court. Mr. Colden, of counsel for the defense, answered:

"That is not the law as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient, in the first instance, to declare generally that the witnesses are material without specifying the particular points to which they are to testify, and that without them our client can not safely proceed to trial."

To which the answer of the judge was this:

"You must offer an affidavit, and must show in what respect the witnesses are material."

Now mark the reason upon which that ruling was founded:

"The facts charged in the indictment took place, and are laid, in New York; the witnesses are admitted to have been during that period at Washington. The presumption is therefore that they can not be material, and this presumption must be removed by affidavit."

That is the rule. If we were asking for a postponement on account of a witness who manifestly was a thousand miles off at the time the fact which we wished to examine him upon occurred, that would raise such a presumption against us that the court would very properly call upon us to show how that witness could be a material witness. They have cited this book as a precedent, and, so far as I have read it, it is a sound precedent. Let them follow it up.

At the conclusion of the arguments, Mr. Roscoe Conkling, of New York, proposed this order, which was agreed to without division:

Ordered, That the Senate will receive any evidence otherwise competent which the counsel for the respondent assure the Senate will be connected with the case by the testimony of the witness Evans, now absent, but whom the respondent duly asked to have summoned and who is expected to appear.

Later, during the same day,[9] Mr. Carpenter announced:

Now, Mr. President, we have completed all the testimony that in our opinion as counsel we can properly and safely introduce until Mr. Evans is sworn. We now repeat the request that the court adjourn for a reasonable time to enable Mr. Evans to be present.

Mr. Manager McMahon said:

We certainly renew our objections, Mr. President, to a continuance without a compliance with the rule, or, if not the rule, a rule that ought to be established by the Senate, that the materiality or pertinency of the testimony expected be submitted to the Senate. The question has been argued.

Soon after Mr. Carpenter asked leave to file this affidavit in support of their motion:

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[9] Senate Journal, pp. 978–981; Record of trial, pp. 269–273.

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In United States Senate sitting as a court of impeachment

THE UNITED STATES

v.

WILLIAM W. BELKNAP

DISTRICT OF COLUMBIA, *ss:*

W. W. Belknap, being first duly sworn, on oath says that he has stated to his counsel, Hon. J. S. Black, Montgomery Blair, and Matt. H. Carpenter, what he expects to prove by John S. Evans, and after such statement is advised by his said counsel, and verily believes, that the testimony of said Evans is material and necessary for his defense in this cause, the said Evans being the same person upon whose appointment the articles of impeachment are based; that said affiant is informed and believes that said Evans is en route for Washington and detained by high water obstructing the roads, but that he will be in as soon as he can get here, and this application for postponement of the trial is made in good faith, and not for delay.

WM. W. BELKNAP.

Subscribed and sworn to before me this 12th day of July, A. D. 1876.

W. J. MCDONALD,
Chief Clerk Senate.

Mr. Manager McMahon said:

The objection has been fully stated, and we only rise now to enter it formally here.

In support of the objection Mr. Manager Elbridge G. Lapham said:

The respondent entered upon the trial without objection, upon the assumption that he was ready for trial. We are now in the midst of the trial; and a different rule, I submit, applies to this case from what would have been applicable if this application to postpone had been made before the trial commenced, upon the ground that Evans was not here in attendance. We have waited until the evidence on our side is completed, with the right to call this witness in case he comes, for we want him, I apprehend, much more than the defense. We have waited until the defense have exhausted in the main their evidence, according to the suggestion of the counsel. Now they propose to stop this trial midway, and postpone the further hearing by reason of the absence of this witness, without any suggestion as to what they propose to prove in respect to this case by him. I submit that an application now, pending the trial, is upon an entirely different footing from an application made before the trial is entered upon on the supposition and statement that the party is not ready for trial and can not properly commence it. The defendant did not ask to postpone this case on the ground that his witnesses were not here. He entered upon the trial on the 6th of the present month, the day assigned by the Senate for the trial, without objection that he was not prepared to go through with it. It was then the proper time, if his witnesses were not here, for him to have asked a postponement until their arrival. Having entered upon the trial, and having proceeded to the point we now have reached, I submit that the application to postpone is upon a different footing from what it would have been if made then.

Mr. Carpenter replied:

Mr. President, the reason for strictness against an application made to adjourn a cause after the trial of it has commenced in a court of law is that a jury is not a continuing institution. It is summoned for a term, and it never comes again. That particular body never comes a second time. That is the reason, and it is always stated so, why greater strictness is observed in regard to the postponement of a trial commenced before a jury. Everything that has been done must be lost. The testimony at the next term must be retaken, and the whole case proceed de novo. Here is a trial in the court of impeachment before the Senate of the United States, a body that can not die as long as the Government lives, a continuous institution, that is not to lose the benefit of what has been done. The strict attention which has been paid by every Senator here to this testimony shows that it will never fade from his recollection. There is not the slightest fear that when the Senate shall postpone this hearing for a week or

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ten days to have this witness arrive any of the testimony will be even faintly fading away at all in the minds of the Senate. The argument, therefore, made by the managers as to a nisi prius trial before a jury has no application.

Again, he says we ought to have applied for a continuance before we commenced the trial. I have already stated to the Senate, and now repeat, that when we made our application to have this witness subpoenaed he was not subpoenaed in our behalf, because the Government had subpoenaed him themselves. The Government were here with their case, and Mr. Evans was one of their witnesses, and we have heard from first to last that he was one of their main and principal witnesses, the thought of whose absence makes their grief overflow. We had no doubt that the managers were acting in good faith. We had no doubt that they would not proceed to the trial until they knew their chief witnesses were at command.

Mr. Carpenter then presented this request:

The respondent's counsel ask for an order that the further trial of this cause be postponed until notice be given by the Senate to the House of Representatives of the United States and to the respondent.

Pending consideration of this application, the Senate sitting for the trial adjourned.

On July 13 the President pro tempore laid before the Senate a communication from the Sergeant-at-Arms of the Senate describing the efforts made to secure the attendance of the witness, and stating that the latter had started for Washington, but had been detained by bad roads.

Mr. Thomas F. Bayard, a Senator from Delaware, having propounded to counsel for the respondent a question which had not been answered, proposed the following:

That as a condition precedent to the order for postponement of this trial asked for on the 12th instant by the respondent it is

Ordered, That the respondent inform the Senate what in substance he proposes to prove by John S. Evans, the witness on the ground of whose absence postponement is asked.

Mr. Carpenter then said:

Mr. President and Senators, I desire in the first place to enter a respectful protest against being compelled in a criminal case to state what we expect to prove by a witness. I do that, not for its importance in this case so much as I hold that every lawyer defending a person accused in any court owes it to his profession to stand by the regular practice, and I understand that to be the regular practice almost without exception, that where a defendant in a criminal case is not in fault to the subpoenaing of a witness he is not compellable to state what he expects to prove by that witness.

In this case, however, one or two things I may state. In the first place, we expect to prove by Mr. Evans one reason why he was not appointed when he first applied for this position, and that was that he intended to form a partnership with Durfee * * * and that that was one important reason why he was not appointed at first.

In the next place, let me say that Mr. Evans is the man upon whose appointment these articles rest. We have never examined him nor had an opportunity to do so. He has sworn twice before a committee of the House, and the testimony presented by the managers is quite voluminous in manuscript. We have never read it; at least I have never read it; and I never supposed we should be called upon to read it, because we had the assurance of the Government that Mr. Evans was to be here. It seems now, from the statement of the Sergeant-at-Arms, that Mr. Evans was here and was released temporarily by the managers themselves without consultation with us. Our witness had been subpoenaed by the order of the Senate, has been here, has been discharged or released temporarily by the opposite party without consultation with us, and we desire to call and examine him.

Now we are asked, "Will you state what you expect to prove by him?" We can not, because we do not know what he will swear to in regard to certain points.

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And, sir, in a trial like this where every word we utter goes upon the record to be called back in the summing up of this case to show that we were mistaken about what the witness would swear, we should be guarded and prudent. We know this man Evans has had intimate knowledge of the management of that tradership from first to last, for he has been the trader. We know from glancing through certain other testimony and from certain other facts within our knowledge that he must have knowledge of certain subjects which we think if he would swear one way will be important to us; if he would swear the other way it might not be so beneficial to us. We think he will swear in our favor; and yet we do not know what he will swear; and therefore we do not know what we expect to prove by him.

The Senate, without further action on the application, adjourned.

On July 14 the Senate sitting for the trial adjourned to Monday, the 17th, the following order being made:

Ordered, That when the Senate sitting for the trial of impeachment adjourns it be till Monday next and that the trial then proceed.

On Monday, the witness not having arrived, Mr. George F. Edmunds, a Senator from Vermont, proposed this order:

Ordered, That the respondent have leave to examine John S. Evans at any stage of the proceedings prior to the termination of the argument-in-chief to any matter material to his defense.

But on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That the Senate sitting in this trial adjourn until Wednesday, the 19th instant.

On Wednesday Mr. Evans was present, and was sworn.

2158. The Senate sitting on impeachment trials is empowered by rule to compel the attendance of witnesses.

The Senate sitting on impeachment trials has authority to enforce obedience to its orders, writs, judgments, etc., punish contempts, and make lawful orders and rules.

The Sergeant-at-Arms is authorized by rule to employ necessary aid to enforce the lawful orders, writs, etc., of the Senate sitting on impeachment trials.

Discussion as to the power of the Senate sitting on impeachment trials to command assistance of the military, naval, or civil service of the United States.

Discussion as to the power of the Senate sitting on impeachments to enforce its final judgment.

Present form and history of Rule VI of the Senate sitting for impeachment trials.

Rule VI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant-at-Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

This rule dates from the revision made in 1868, at the time of the impeachment proceedings against President Johnson. The committee,

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of which Mr. Jacob M. Howard, of Michigan, was chairman, reported[10] the rule in this form:

VI. The court shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the presiding officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

The Senate having come to a conclusion which caused the word "court" to be discarded, the word "Senate" was substituted.[11] Before that was done, however, another question had been presented by the motion of Mr. Willard Saulsbury, of Delaware, who moved to strike out the lines—

And the Presiding Officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

Debate arose on this motion,[12] involving two points—one as to the power of the Senate to command such assistance for its incidental or interlocutory judgments, and the other as to the power to enforce by such means, or by any means, its final judgment.

In support of his motion Mr. Saulsbury said:

My reason for making this motion is that, in my judgment, it is not in the constitutional power of the Senate of the United States, when acting in the discharge of its ordinary duties or as a court, to command the services of the Army and Navy or of any officer of the Army and Navy; that if it is proper to clothe the court with such a power it is necessary to pass an act of Congress giving them the authority, if such an act itself could be constitutionally passed. Suppose that this provision of this article remained, and the court called upon the officers of the Army and Navy to assist the court in the discharge of its duties, and they should assist them either as officers or in company with men under their command, what power would the court have to compel their attendance and their assistance? They are already under the command, in the first instance, of the General of the Army, and, secondly and chiefly, under that of the President of the United States.

How, therefore, can the Senate, acting as a Senate, command the services of the Army and Navy or the officers of the Army and Navy? Suppose they refuse to obey the order of the court made upon them for any attendance or to assist the court, how can you enforce that order? I submit, Mr. President, if their services can be invoked by any agency whatever, it can only be done after the passage of an act by the two Houses of Congress; that the court then would be acting in pursuance of law; but that the orders of this body, this Senate, are not law, and that the words, if they remain, will be a nullity and inoperative.

Mr. George H. Williams, of Oregon, said:

Assuming that the Senate, when it proceeds to try an impeachment, is a court, I suppose it possesses those powers as to the execution of its judgments that other courts possess—no other or greater powers. I do not suppose that it can be contended that the Senate can make a rule which will have the force of law. True, the Senate may provide for its own government in the transaction of any particular kind of business; but I do not understand that the Senate can make a rule that will operate upon persons outside of the Senate, or that will operate like a legislative act.

Assuming, then, that the Senate, in making these rules, is confined to the creation of orders that regulate its own actions, it seems to me to follow neces-

[10] Second session Fortieth Congress, Senate Report No. 59.
[11] Globe, p. 1602.
[12] Senate Journal, pp. 238, 812; Globe, pp. 1526–1533.

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sarily that the court has no power by the use of military force to execute its judgment. Take any court; if you please, the supreme court of the District of Columbia. Suppose a judgment is rendered by that court; it becomes the duty of the ministerial officer, the marshal or the sheriff, to execute that judgment. If resistance is made to the process in his hands, then he may summon the posse comitatus for the purpose of executing that process; and if the resistance is so strong as to defeat his proceedings, under such circumstances, if there be any law of the land which authorizes it, he may call upon the military to assist him in the execution of the process. But I submit that when judgment is rendered by the court the jurisdiction of the court is at an end, so far as enforcing its execution is concerned. Can the supreme court of the District of Columbia make an order and enter it upon its records that if any process of that court is resisted a military or naval force shall be employed in the execution of that process? * * * as to whether the court in session may make an order commanding the military or naval forces of the United States to do any act whatever, unless it may be to protect the court, to protect its dignity, to preserve decorum. That is an inherent power in the court. But can the court issue an order as a court and say to General Grant, "You marshal your army in such a place for such a purpose? Or can it issue an order to any admiral in the Navy to put his armed vessels in any particular position for any purpose? It seems to me that, if there is no law on the subject, there ought to be a law providing for the enforcement of judgments that are rendered in cases of this kind. If there be no law, then such a law ought to be enacted; but because there is no law the Senate has no power to assume to create such a law and exercise legislative power. I do not desire to have the Senate in making these rules go beyond its jurisdiction, though I am in favor, of course, of all rules that are necessary to enable the Senate to transact its business. But it does seem to me that if in a case of impeachment that may be tried before the Senate a judgment of guilty should be pronounced by the court it can make no subsequent order for the execution of that judgment. If the person who is to be removed from office by that judgment refuses to obey that judgment, then legislation will be necessary or some other power must be interposed.

Mr. John Sherman, of Ohio, concurred with Mr. Williams if the rule was intended to enforce the final decree of the court. But he conceived that the rule was intended to apply only to what might be called the interlocutory orders of the court, to compel the attendance of witnesses, or judgments finding recalcitrant witnesses in contempt.

Mr. Reverdy Johnson, of Maryland, said:

I concur with the honorable Member from Delaware and the honorable Member from Oregon that we have no power to adopt the rule which we are asked to adopt. The rule which we are asked to adopt is one which, when proposed in the committee, of which I had the honor to be a member, I resisted, and I have seen no reason to change the opinion which led me to that course.

The authority conferred upon the Senate is to try all cases of impeachment, and the Constitution provides that when the President is the party impeached the Chief Justice is to preside; and the judgment which the Senate, acting as a court of impeachment, may pronounce can not extend beyond a declaration that the party impeached shall be removed from office and be thereafter ineligible to any other office of trust or profit under the United States. The "judgment shall not," in the language of the Constitution, "extend further than" that; and upon that judgment being rendered in the case of a President—we are to look at that as a case which is really now before us with reference to this question—the Vice-President, if we have one, is to become President; and if the Vice-President is himself the President and is himself the party impeached, the President pro tempore of the Senate is to become President. No process, therefore, is necessary to enforce that judgment to that extent. The moment it has been pronounced the incumbent who has been impeached ceases to be President, and the party next in succession becomes at once the President. When he is the President he has precisely the same authority that he who is elected President and who takes his office at the termination of the term of his predecessor has.

Mr. George F. Edmunds, of Vermont, argued:

I should be sorry to see us strip ourselves, by refusing to adopt a rule of this kind, of the power which that rule confers. It is a power which inheres in a body

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like this, as it does to the House of Commons and the House of Lords in England, from whence we derive our theory of trying impeachments. This rule only regulates and puts in force in the way of execution this existing power. We have to act as an organized body, whether sitting as a Senate or sitting as a court, because, as I said before, it is the same body exercising different functions, sitting for different purposes. Therefore, when the Constitution permits us to make rules and regulations for the government of the Senate, I think under the Constitution we can make a regulation for the government of the Senate when it is exercising any of the functions that the Constitution imposes upon it. Being of the opinion that this power to protect ourselves, and to enforce any order or mandate that the Constitution authorizes us to make, exists, while I agree that it ought to have the assistance of law in a great many respects, it being in my judgment an inherent power, we have a right to regulate and to name the cases in which it shall be put in exercise. As I have said before, if any question arises after we are sworn, and the Chief Justice takes the chair, as to the fact that the functions of the court are cramped by these general rules, it will be time enough then for the court to say that it will or will not (because it is the same body) change or execute them. Now, I should be sorry to see the Senate exercising the constitutional power of making rules and regulations in general, refuse to provide for putting in exercise a power of this kind, while I hope and believe it will not be necessary to make use of it; especially in view of the fact that it has been published to the world in another place (using parliamentary language), by a distinguished leader, that our orders, processes, and mandates will be resisted. * * *

The Constitution says that we are to try and adjudge, and there the Constitution stops; and hence, upon the logic of that proposition, inasmuch as the Constitution does not provide how we are to get the Chief Justice in here in a certain case, or how we are to be sworn in a certain other case, the law providing no oath, the Constitution providing no oath, merely stating that we are to be sworn, we are perfectly helpless. In short, the argument is that the Constitution is not a code of procedure; that it does not contain a set of rules and regulations. Mr. President, that is a mistake. It is a mistaken idea of the nature of the Constitution, of the idea of conferring constitutional power. Wherever there is a grant of power by a law or by a constitution to a tribunal or a body or a person, there is granted in that power, as a part of it, there is conferred as in it and of it and a part of it all the power that is necessary, justly and properly necessary, to the due exercise of the power conferred. So the Supreme Court frequently decided in the days of Marshall; and I challenge contradiction upon the proposition. * * *

The Senate gives itself the power, without having an endless debate on the subject, to direct its Presiding Officer, when we have a justice of the Supreme Court on trial or any other man accused, to apply to the President of the United States and ask of him the assistance that is necessary to protect us in the exercise of our functions. It does not assume the legislative power of imposing any penalty if that President should refuse. There is the distinction. If we were desiring to get a witness into court who refused to come, and force were needed to bring him upon attachment, it would be necessary, if he should bring action against one of the assistants of the Sergeant-at-Arms, for that assistant to defend on the authority of the Senate, and to prove that it was by our authority that he assisted the Sergeant-at-Arms in bringing in the witness. Now, what does this rule provide? It provides for all such cases in advance, without having a squabble over them at the time. By it our authority is given in advance, by a mere order to that effect on a single point, to call upon everybody to assist in the enforcement of our process.

Now, as to the final process, if you speak of it as process—it is not so spoken of in the report; it is spoken of as a judgment—it is said that the word "judgment" may include the final judgment. The term "judgment," of course, does in its natural meaning include final judgments as well as interlocutory ones; but we must always construe language in reference to the subject to which it is to be applied. As applied to interlocutory judgments, we all seem to agree that it is proper. When you come to final judgment, although there is no express exception made, the nature of the final judgment has been well stated by the Senator from Ohio; it is a judgment the very force and operation of the pronouncing of which is to change the office, speaking in the case of a President, from one person to another; so that the judgment in a certain sense may be said to execute itself. Therefore, if you say the word includes final judgment, and you may in that literal sense, it does no harm, because all that then you would call upon anybody to do would be to call upon the new and lawful President of the United States to assist the Senate in putting himself into possession of his own office.

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The motion of Mr. Saulsbury, to strike out, was agreed to, yeas 25, nays 15.

Mr. Lyman Trumbull, of Illinois, said during the debate:

I will state that in the committee, as I was a member of it, I thought it better not to have this clause in, and I was in favor of the old rules as far as they could be made applicable to the present case. I thought the fewest changes made the best. Now, I submit to the Senate whether we shall not accomplish all we want by adopting the old rule on this point. I think the Senator from Indiana will be satisfied with that, and I think we ought all to be satisfied with it. The old rule provided that the Presiding Officer "shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons during the trial, to discharge such duties as may be prescribed by him." The marshal has authority under the general laws to call a posse, if necessary, to call on the military if necessary. We have a marshal in the District of Columbia not acceptable I believe to everybody, but I think a marshal who will do his duty, whatever his duty is, as faithfully as anybody else. Why not strike out all of the words of this rule? After the word "court" strike out and insert what I have read, so as to read:

"The Presiding Officer may by the direction of the court direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial to discharge such duties as may be prescribed by him."

I think that would get us out of this difficulty.

Objection was made to this old rule—which dated from the trial of Judge Chase, in 1805—on the ground that the marshal of the District of Columbia had duties of his own prescribed by law, and might not be at the service of the Senate. There was discussion also as to his power, and the power of the Sergeant-at-Arms, to summon a posse comitatus to assist. Finally Mr. Trumbull's proposition was put in form as follows, and agreed to without division:

And the Sergeant-at-Arms, under the discretion of the court, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of said court.

Subsequently, in accordance with the general principle agreed on, the final words "said court" were stricken out, and the "Senate" inserted..

So the rule was finally agreed to in the form in which it now exists.

2159. The Senate, sitting for the Belknap trial, declined to order process to compel the attendance of a witness who had been subpoenaed by telegraph merely.—On July 10, 1876,[13] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an attachment to compel the attendance as a witness of John S. Evans. Mr. Carpenter stated that Evans had been subpoenaed, but had not appeared. The following return was read:

WASHINGTON, *D.C., July 1, 1876.*

I made service of the within subpoena, telegraphing the same to the within-named John S. Evans, at Fort Sill, Ind. T., on the evening of the 22d day of June, 1876.

JOHN R. FRENCH,
Sergeant-at-Arms United States Senate.

Mr. Manager John A. McMahon also said:

I will state in addition that I have seen a dispatch in the Sergeant-at-Arm's room from John S. Evans acknowledging the receipt of this subpoena.

It was then

[13] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, pp. 226–228.

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Ordered, That an attachment issue for the said John S. Evans.

Presently Mr. George F. Edmunds, a Senator from Vermont, asked if there was proof that Evans had been served with the subpoena. It having been stated in reply that the proof being by telegraph, Mr. Edmunds moved to reconsider the vote on the order, and the motion was agreed to.

Then a discussion arose, in the course of which it was developed that the subpoena for this witness, as well as for other witnesses living at a distance, had been served by telegraph.

Mr. John W. Stevenson, a Senator from Kentucky, said he was not aware of any law permitting a witness to be subpoenaed by telegraph, and expressed a doubt as to the legality of an attachment based on a subpoena thus served. Mr. Roscoe Conkling, of New York, expressed the same doubt, and Mr. Edmunds said:

That is no service in point of law.

On motion of Mr. Edmunds the subject was laid on the table.

Then, on motion of Mr. Edmunds,

Ordered, That a subpoena issue commanding the said John S. Evans to appear forthwith before the Senate.

2160. The Senate, sitting for an impeachment trial, has commanded a reluctant witness to produce certain papers in its presence.—On July 8, 1876,[14] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Leonard Whitney was sworn and examined as a witness on behalf of the United States. The witness was manager for the Western Union Telegraph Company and had been subpoenaed to produce telegrams passing between Caleb P. Marsh and the respondent.

Mr. John A. McMahon, of the managers for the House of Representatives, said to the witness:

Now open your package and see what dispatches you have from Washington to New York, passing between Mr. Marsh or R. G. Carey & Co. and W. W. Belknap.

The witness replied:

Before I do so I wish to state that I can not produce these telegrams unless I am required to do so by the court; and I respectfully submit to the court that they are privileged communications, and I ought not to be required to produce them.

The President pro tempore[15] thereupon submitted the question to the Senate, Shall the witness produce the telegrams? and it was decided in the affirmative without division.

2161. In impeachment trials before the House of Lords it is the practice to swear and examine the witnesses in open house.

Under the parliamentary law witnesses in an impeachment trial may be examined by a committee.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

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[14] First session Forty-fourth Congress, Record of trial, p. 216. The Senate Journal (p. 966) indicates that Mr. Matt. H. Carpenter, of counsel for the respondent, made the objection instead of the witness, but the verbatim account in the Record of trial seems conclusive.

[15] T. W. Ferry, of Michigan, President pro tempore.

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

2162. Form of oath administered to witnesses in impeachment trials.

Form of subpoena issued to witnesses in impeachment trials.

In impeachment trials subpoenas are issued on application of managers or the respondent or his counsel.

Form of direction for service of subpoenas to witnesses in impeachment trials.

Discussion as to the competency of the Senate to empower one of its officers to administer oaths.

Present form and history of Rule XXIV [16] of the Senate sitting for impeachment trials.

Rule XXIV of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

Witnesses shall be sworn in the following for, viz: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and ——— ——— shall be the truth, the whole truth, and nothing but the truth, so help you God." which oath shall be administered by the Secretary or any other duly authorized person.

FORM OF A SUBPOENA TO BE ISSUED ON THE APPLICATION OF THE MANAGERS OF THE IMPEACHMENT OR OF THE PARTY IMPEACHED OR OF HIS COUNSEL.

To ——— ———, *greeting:*

You and each of you are hereby commanded to appear before the Senate of the United States, on the ——— day of ———, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———,

——— ———,
Presiding Officer of the Senate.

FORM OF DIRECTION FOR THE SERVICE OF SAID SUBPOENA.

The Senate of the United States to ——— ———, *greeting:*

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this ——— day of ———, in the year of our Lord ———, and of the Independence of the United States the ———.

——— ———,
Secretary of the Senate.

These forms were agreed to in 1868 [17] on report from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman. They were adopted, with slight variations of phraseology from the forms used in the impeachments of Blount and Chase, in 1797 and 1805. The words "high court of impeachment," which had been introduced in the

[16] See also section 2080 of this volume for other portions of this rule.
[17] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

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forms as reported, were stricken out in accordance with a general conclusion of the Senate as to its functions.

As reported, the rule provided simply that the oath to witnesses should be administered by the Secretary. The words "or any other person duly authorized" were added on motion of Mr. Roscoe Conkling, of New York. A difference of opinion had arisen as to the power of the Senate to confer on anyone the authority to administer an oath.

Mr. John Sherman, of Ohio, argued [18] that it could only be done by law, because if perjury should arise, the oath must be shown to be administered by an officer authorized by law to administer an oath. The Secretary had power to do so. Mr. Howard held that the Senate had the power, as belonging to its judicial function in trying the case, to provide for the administration of the oath.

2163. In impeachments a Senator called as a witness is sworn and testifies standing in his place.

Present form and history of Rule XVII of the Senate in impeachment trials.

Rule XVII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

> **If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.**

This rule dates from 1797,[19] when it was adopted for the trial of William Blount. In 1805,[20] at the time of the trial of Judge Chase, it received verbal changes merely.

2164. During the Belknap trial Senators were called as witnesses and were sworn, and testified standing in their places.—On July 12, 1876,[21] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, said:

> **Mr. President, I desire to call Senator Allison, of Iowa.**

The President pro tempore [22] said:

> **The Senator will stand in his place and be sworn.**

Hon. William B. Allison was sworn and examined, standing in his place.

Similarly, George G. Wright, a Senator, was called, sworn, and examined.

2165. In an impeachment trial testimony is presented generally and is not classified according to the article to which it applies.—On February 11, 1805,[23] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, a witness was called, in behalf of the managers, when Mr. Robert G. Harper, counsel for the respondent, stated that this witness was called on an article subsequent to that on which the witnesses already examined had testified. He would submit a proposition to the honorable managers to go

[18] Globe, p. 1593.
[19] First session Fifth Congress, Senate Journal, p. 566; Annals, p. 2197.
[20] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.
[21] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 267.
[22] T. W. Ferry, of Michigan, President pro tempore.
[23] Second session Eighth Congress, Annals, p. 193.

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through at one time the whole of the testimony on each article. It might not be the regular course, but if gentlemen assent to it, said Mr. Harper, we shall prefer it; it will be convenient to the witnesses, many of whom may be discharged before the whole of the testimony is gone through.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

Though this mode may have its advantages, it is attended with its difficulties. A witness may be found to support more than one article. With regard to the first article, I have no objection to this course; but with regard to the subsequent articles I have.

The President [24] said:

If the gentlemen are agreed, I will take the sense of the Senate on the course to be pursued.

Mr. Randolph said:

It is the wish of the managers not to depart from the usual course.

Mr. Harper said:

We do not claim it as a right.

2166. In the Johnson trial the Chief Justice held that evidence might be introduced during final arguments only by order of the Senate.—On April 20, 1868,[25] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the testimony had been nearly closed on both sides, Mr. Manager John A. Bingham suggested that it might be the desire of the managers later to examine one or more witnesses. This caused a discussion as to the admission of testimony after the beginning of the final arguments. Mr. Reverdy Johnson, a Senator from Maryland, express the opinion that such a course would not be in accordance with the American practice. Mr. Manager Bingham suggested that it had been done in the trial of Judge Chase, although he could not speak positively.

The Chief Justice [26] said:

In case the honorable managers desire to put in further evidence after the argument it will be necessary to obtain an order of the Senate; at least it would be proper to obtain such order before the argument proceeds.

2167. The proposition that evidence in an impeachment trial may be admitted or excluded by a majority vote has not been questioned seriously.—On July 21, 1876,[27] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War. Mr. Jeremiah S. Black, of counsel for the respondent, was making his argument in the final summing up, and was holding that, as two-thirds of the Senate were required to convict, so also two-thirds were required on a vote determining jurisdiction.

Mr. Allen G. Thurman, a Senator from Ohio, propounded this question:

If it requires two-thirds of the Senators present to overrule the respondent's plea to the jurisdiction, does it not follow that two-thirds are necessary to overrule any objections to testimony made by the respondent or to sustain an objection to testimony made by the managers?

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[24] Aaron Burr, of New York, Vice-President, and President of the Senate.
[25] Second session Fortieth Congress, Globe supplement, p. 239.
[26] Salmon P. Chase, of Ohio, Chief Justice.
[27] First session Forty-fourth Congress, Record of trial, p. 315.

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Mr. Black replied:

No; clearly not. I admit that is a very fair attempt at the reductio ad absurdum of our proposition, but it does not succeed. What I say is that two-thirds are required to establish any fact which is an essential element in the conviction. Every other fact may be established and every other order may be made by a bare majority. I do not say that, because this is a court of impeachment and two-thirds of the Senate are required to concur in a final conviction, therefore every time an adjournment is moved it can not succeed with a majority of two-thirds.[28]

2168. Witnesses in an impeachment trial are examined by one person on either side.

Present form and history of Rule XVI of the Senate sitting for impeachments.

Rule XVI of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

This rule was first drafted in 1805 [29] for the trial of Judge Chase. In the revision of 1868,[30] preparatory to the trial of President Johnson, it was amended by striking out the words "cross-examined in the usual form," and inserting "cross-examined by one person on the other side."

2169. The managers in the Swayne trial having offered to prove a statement made by respondent before the House committee, counsel successfully resisted the reading of the statement as part of the offer.

An argument by counsel for respondent against the "offer of proof" method of presenting evidence in an impeachment trial.

Instance wherein counsel for respondent in the Swayne trial was called to order for language reflecting on the conduct of the managers.

On February 14, 1905,[31] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommitte of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

At this point Mr. John M. Thurston, of counsel for the respondent, objected to the reading of the statement, saying:

Mr. President, standing here as objecting to this offer, I repeat what I said a few days since about this attempt to present to this court the statements made by Judge Swayne while he was a witness before a committee of the House of Representatives. The offer to prove what he said before that committee is all that, under any rule of practice that has ever prevailed in any court, can be made. It has never been held that in offering to prove what a witness had said somewhere else a statement could be made in the offer of what he had said somewhere else, because that would, by indirection and by pettifog-

[28] During the trial of President Johnson a suggestion was made by Mr. Garrett Davis, of Kentucky, that the two-thirds rule should prevail as to ruling questions of evidence or law against the respondent, and he introduced an order to that effect; but it was not acted on. Second session Fortieth Congress, Senate Journal, p. 382.

[29] Second session Eighth Congress, Senate Journal, pp. 511-513; Annals, pp. 89-92.

[30] Second session Fortieth Congress, Senate Report No. 59, Senate Journal, p. 813; Globe, p. 1568.

[31] Third session Fifty-eighth Congress, Record, pp. 2536, 2537.

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ging, Mr. President, present to the court, the judge, or the jury the statement of what the evidence would show when it was really admitted, if at all, and evidently in the expectation——

At this point Mr. Edmund W. Pettus, of Alabama, intervened and said:

Mr. President, I object to the word "pettifogging" being used in this court.

The Presiding Officer [32] said:

The Presiding Officer thinks that the word ought not to have been used.

Mr. Thurston then continued:

I apologize for the use of that word. I was not using it with reference to this offer. I was saying that it was a common custom in some courts to attempt to show by a statement of this kind what a witness had said somewhere else, when the attorneys making the offer knew and understood perfectly well that the statement itself would not be proper evidence to be introduced in the case, and that an offer of this kind was and is an attempt to present to a court evidence known to be improper, prohibited by the statutes of the United States, and its reading to the court in an offer must necessarily be, and can only be, an attempt by indirection to place in the record and before the judges testimony that they know is not legal testimony and ought not to be considered.

Now, Mr. President, I do not wish to reflect—and if I have made any reflections upon these honorable managers I withdraw them—I do not wish to reflect upon them in this case, but I do say that in other cases and in other courts where offers of this kind have been made they have been necessarily made with the express desire to place in the record and before the court and the jury a line of evidence that is prohibited by the law of the land from being presented. We object both to the offer to introduce the testimony and to the offer to read the proposed testimony to this court. Mr. President, we also protest against this manner of presenting evidence by an offer to prove something.

The only proper way, in our judgment, if the managers wish to produce this testimony and have this court pass upon its competency, is to put a witness on the stand or to offer the record, to ask the question, or let the record be objected to, and pass upon that. I do not think it is proper for us, Mr. President—and the occasion may arise in this case where it would be most desirable for us, if it were proper—to offer to prove a certain statement of fact that we do not believe can be introduced in evidence if objected to upon the other side. But, sir, feeling our responsibility here, we will not attempt to offer before this court a statement of anything, nor will we attempt to offer in this court to prove facts setting it forth. What facts we have to prove we will prove by records, or we will prove them by questions directed to the witnesses presented in the court, and let the objections, if any there be, be taken in the regular way and upon legal lines.

Mr. Manager Palmer announced that he would hand the statement to the court and let the court pass upon it:

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, while the Presiding Officer passes on such questions in the first instance, Senators must pass upon it finally, and they know what is offered before they can vote intelligently upon the question. It is unprecedented to say that the court shall not be permitted to hear what is offered before passing upon the admissibility of it. * * * for my own guidance, I would like to know exactly the question before the court.

The Presiding Officer said:

It is in writing. The managers offer to prove that the respondent on the 28th day of November, 1904, in the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been

[32] Orville H. Platt, of Connecticut, Presiding Officer.

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summoned as a witness or otherwise, and voluntarily made the following statement. Then the statement is recited.

No further demand was made for the reading of the statement, and it was not read.

2170. Managers and counsel disagreeing as to method of direct and cross examination of a delayed witness the Senate ordered examination in accordance with the regular practice.—On July 12, 1876,[33] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the managers announced:

We desire to state to the Senate that we are through with our case in chief for the United States with this exception, that if Mr. Evans arrives in the usual course of the trial of this case, we desire to put him on the stand, or if he is put upon the stand by the defense we desire permission to put to him such questions as would be competent and proper if he were examined by us in chief; but we do not ask the delay of this case one hour for the arrival of Mr. Evans. On the contrary, we ask that it proceed.

The President pro tempore said:

Is there objection to this privilege of examination being reserved?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

On July 19[34] John S. Evans appeared, and was called as a witness on behalf of the respondent.

Mr. Carpenter said:

Mr. President, I desire to say to the managers that Mr. Evans is now upon the stand. If they wish to examine him as a witness on the part of the prosecution, we make no objection to their doing so. If they do not, we give them notice that we shall insist on their being held to a proper cross-examination.

Mr. Manager John A. McMahon said:

Mr. President, we desire to state to the Senate that we shall claim the right to call out on cross-examination whatever is legitimate and proper in this case. I think, after having waited for nearly a whole week for the witness to come to accommodate the defense, that the Senate will endeavor to expedite matters by enabling us to put our questions to the witness upon cross-examination with the full privilege of the gentlemen in rebutting to ask him to explain all those matters about which we may inquire, which will make one examination answer all the purposes of this case, whereas if we now examine him the gentlemen on their side will have a right only to cross-examine him as to what we examined into, and then they must put him on the stand, we cross-examine him, and so on, making really a double examination, and upon the good sense of the Senate on that question we rely now. The gentlemen may examine Mr. Evans.

Mr. Carpenter rejoined:

It will be recollected that the manager stated to the Senate that Mr. Evans was one of his most important witnesses. When he closed his case, he closed it reserving the right to call Mr. Evans if he should appear at any time during the trial. Mr. Evans is now present. We waive all objection to his being examined in chief on the part of the Government if they wish to examine him. If they do not, we shall insist, as far as we can insist, that when they come to the cross-examination they shall be restricted to the proper rules of cross-examination.

Thereupon, on motion of Mr. Roscoe Conkling, a Senator from New York, it was—

Ordered, That the managers proceed to examine the witness Evans in chief; or, should they decline to do so, the respondent may proceed to examine the witness in chief, with the right of the managers to cross-examine him like any other witness.

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[33] First session Forty-fourth Congress, Record of trial, p. 255.
[34] Senate Journal, p. 981; Record of trial, p. 273.

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2171. The Senate prefers that managers and counsel, in examining witnesses in an impeachment trial, shall stand in the center aisle.—On February 15, 1905,[35] in the Senate sitting for the impeachment trial of Judge Charles Swayne, it was directed that the managers in examining witnesses should stand in the center aisle of the Senate Chamber, near the rear row of seats, so that the answers of witnesses might be heard readily by the Senators.

Later, however, Mr. Anthony Higgins, of counsel for the respondent, urged that he must stand by the table in examining witnesses, as he needed to consult certain documents.

But generally managers and counsel stood in the central aisle when conducting the examinations.

2172. Witnesses in an impeachment trial give their testimony standing unless specially permitted to sit.—On February 14, 1905,[36] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Joseph H. Durkee, had been sworn, when the Presiding Officer [37] said:

> The witness asks that he may be allowed to be seated. He may sit if there is no objection. The witness will please raise his voice and answer all questions so as to be heard all over the Chamber.

2173. The Senate assigns the place to be occupied by witnesses testifying in an impeachment trial.—On July 6, 1876,[38] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the testimony was about to begin, when the President pro tempore [39] suggested that witnesses take a place at the right of the Chair, on a level with the Secretary's desk; but at the suggestion of the managers and several Senators a place on the floor in front of the Secretary's desk was assigned to the witnesses.

Later [40] Mr. Theodore F. Randolph, a Senator from New Jersey, said:

> Mr. President, is there any objection on the part of the Senate and counsel to have the witness stand at your right or left? So far as I am concerned, it is utterly impossible for me to hear one word out of three that is spoken. It has been so during the whole time. If I take the seat of another Senator, it is at his inconvenience. This is my seat. I have no right to another, but I have a right to hear what is said.

The President pro tempore said:

> The Chair will state to the Senator that he designated a little higher place for the witnesses, but the managers and counsel thought it would be preferable to have the witness in front of the desk, and the Chair submitted that to the Senate, and, as there was no objection, the witnesses were placed there.

Then the President pro tempore put the request to the Senate, and it was ordered that the witnesses stand on the right of the Chair on a level with the Secretary's desk.

2174. During the trial of Judge Chase one of the counsel for the respondent was sworn and examined as a witness.—On February 15, 1805,[41] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, one of the associate

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[35] Third session Fifty-eighth Congress, Record, pp. 2615, 2620.
[36] Third session Fifty-eighth Congress, Record, p. 2535.
[37] Orville H. Platt, of Connecticut, Presiding Officer.
[38] First session Forty-fourth Congress, Record of trial, p. 179.
[39] T. W. Ferry, of Michigan, President pro tempore.
[40] Record of trial, p. 182.
[41] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 246.

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justices of the Supreme Court of the United States, Luther Martin, one of the counsel for the respondent, was sworn and examined as a witness in behalf of the respondent.

2175. The order of taking testimony in an impeachment trial is sometimes waived by consent of both parties.—On February 16, 1905,[42] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, the witness Belden, of New Orleans, has not yet arrived, and with the exception of that one witness, so far as we know now, our case is complete, and we are willing that the respondent may go on with his testimony, with the privilege to us of calling General Belden when he arrives.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, this suggestion was made to me this morning by the managers, and we have no objection to their proposed arrangement, it being, as I understand, that they have closed their case in chief, except as to the testimony of Judge Belden, who is to be produced by them and examined upon his arrival. We make no objection to that request. We should like, however, that they place Judge Belden upon the stand as soon as he does arrive, in order that as far as possible we may have their entire case in before we present our own witnesses.

2176. A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

All orders and motions, except to adjourn, are reduced to writing when offered by Senators in impeachment trials.

The Presiding Officer in an impeachment trial is the medium for putting questions to witnesses and motions and orders to the Senate.

Present form and history of Rule XVIII of the Senate sitting for impeachments.

Rule XVIII of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

This rule dates from the Chase trial in 1805.[43] In the revision of 1868,[44] preparatory to the trial of President Johnson, the form was modified by the insertion of the parenthetical clause and the use of the words "Presiding Officer" for "President."

2177. In defiance of Rule XVIII for impeachment trials, the Senate has established the practice that Senators may interrogate managers or counsel for respondent.

Instance of an appeal from a ruling of the President pro tempore in the Senate sitting for an impeachment trial.

While the Senate was sitting for the impeachment trial of William W. Belknap, late Secretary of War, arguments, continuing from May 4 to May 8, 1876, were offered by the managers on the part of the House of Representatives and the counsel for the respondent on the question of the jurisdiction of the Senate to try a citizen not in civil office at the time of the presentation of articles of impeachment. In the course of these arguments, members of the Senate frequently interrupted the

[42] Third session Fifty-eighth Congress, Record, pp. 2719, 2720.
[43] Second session Eighth Congress, Senate Journal, pp. 511–513; annals pp. 89–92.
[44] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 813, 814; Globe, p. 1568.

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managers and counsel for respondent with questions[45] relating to various points touched in the argument. These questions were generally presented in writing.

2178. On July 20, 1876,[46] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager William P. Lynde was submitting an argument in the final summing up of the case, when Mr. William W. Eaton, a Senator from Connecticut, interrupting, said:

Mr. President, is it proper that I should ask the manager a question?

The President pro tempore[47] said:

It has been so ruled by the Senate.

And thereafter, during the trial, both the managers and counsel for respondent were interrupted by questions.[48]

2179. On July 12, 1876,[49] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, following a custom that had existed during the trial, proposed a question to counsel for the respondent.

Mr. Roscoe Conkling, a Senator from New York, raised a question of order as to the right of a Senator to interrogate counsel.

The President pro tempore[50] said:

The Senator from New York calls the attention of the Chair to the fact that the rule does not authorize the questioning of counsel, but of witnesses. * * * The rule will be read.

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the Presiding Officer."

*** * * The Chair will state that in administering the rule he would not feel authorized to permit a question to be put to the counsel or the managers, for the rule provides only for Senators to question witnesses, and not counsel or managers to be questioned by them. * * * The Senator from New York has stated the point of order, and the Chair simply holds that under the rule No. 18, and which is the only one bearing upon the subject and upon which he rules, the Chair sustains the point of order.**

Mr. Edmunds appealed, and on the question, "Shall the decision of the Chair stand as the judgment of the Senate?" There appeared yeas 18, nays 21. So the Chair was overruled, and the question proposed by Mr. Edmunds was put to counsel.

2180. Questions asked by Senators in an impeachment trial, whether of managers, counsel, or witnesses, must be in writing.—On July 11, 1876,[51] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, several Senators had addressed verbal questions to the managers and to counsel for the respondent. Mr. Roscoe Conkling, a Senator from New York, having called attention to the rule, which he condemned as absurd, the President pro tempore[51a] said:

As the Senator from New York has alluded to the fact that the question was not put in writing, the Chair will say that it has not been done in order to facili-

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[45] First session Forty-fourth Congress, Record of trial, pp. 33, 42, 43, 47, 60.
[46] First session Forty-fourth Congress, Record of trial, p. 296.
[47] T. W. Ferry, of Michigan, President pro tempore.
[48] Pages 297, 315 of Record of trial.
[49] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258, 259.
[50] T. W. Ferry, of Michigan, President pro tempore.
[51] First session Forty-fourth Congress, Record of trial, pp. 248, 249.
[51a] T. W. Ferry, of Michigan, President pro tempore.

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tate business, and a moment ago one of the Senators was about to reduce a question to writing and the Senator from New York stated that the practice had been otherwise. * * *

The Chair to facilitate business has allowed questions to be put without being reduced to writing by their propounders.

Later, colloquies and objection having arisen, the President pro tempore ruled:

The Chair will enforce the rule. Colloquies must cease. Objection has been made, and the Chair must enforce the rule. He will state that on the part of Senators, to guard against any breach of the rules and unpleasantness, he will require all questions to be reduced to writing; and then certainly there can be no debate. The counsel will proceed.

Mr. Richard J. Oglesby, a Senator from Illinois, asked:

Does the decision of the Chair, that no questions can be put hereafter without being reduced to writing, cover questions put by the court to one of the counsel?

The President pro tempore said:

It covers all questions put by members of the Senate. The rule does not require the questions on the part of the parties to be reduced to writing unless so required by the Chair or a Senator; but all questions put by members of the Senate the rule requires shall be put in writing.

2181. On July 19, 1876,[52] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, John S. Evans, a witness on behalf of the respondent, was on the stand, when Mr. Theodore F. Randolph, a Senator from New Jersey, proposed to ask orally a question. The suggestion being made that the question should be reduced to writing, Mr. Randolph urged that such had not been the practice.

The President pro tempore [53] said:

The Chair will observe at this time that so far as questions have been put to witnesses by Senators the rule in the recollection of the Chair has been observed until this time, and the Chair called the attention of the Senator from California, who put a question just now without reducing it to writing, to the fact that the rule required it to be done. The question having been put and it having been reduced to writing, by calling the attention of the Senator to the rule the Chair did his duty. Heretofore no questions have been put to witnesses, as the Chair recollects, without having been first reduced to writing.

2182. Chief Justice Chase finally held, in the Johnson trial, that the managers might object to a witness answering a question put by a Senator.—On April 13, 1868,[54] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was examined as a witness, and Mr. Reverdy Johnson, a Senator from Maryland, presented in writing a question for the witness to answer.

To this question Mr. Manager John A. Bingham, in behalf of the House of Representatives, objected.

Mr. Garrett Davis, a Senator from Kentucky, thereupon raised the question that one of the managers had no right to object to a question propounded by a member of the court.

The Chief Justice [55] said:

When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question

[52] First session Forty-fourth Congress, Record of trial, p. 275.
[53] T. W. Ferry, of Michigan, President pro tempore.
[54] Second session Fortieth Congress, Senate Journal, p. 894; Globe Supplement, pp. 169, 170.
[55] Salmon P. Chase, of Ohio, Chief Justice.

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being put and state the grounds for that objection, as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked, it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

2183. On April 13, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman had been called as a witness on behalf of the respondent. In the course of the examination, Mr. Reverdy Johnson, a Senator from Maryland, propounded this question:

Did you at any time, and when, before the President gave the order for the removal of Mr. Stanton as Secretary of War, advise the President to appoint some other person in the place of Mr. Stanton?

Mr. Benjamin F. Butler, one of the managers for the House of Representatives, at once objected to the question as leading in form, and also as being incompetent according to the decisions of the Senate as to this line of inquiry.

Mr. Garrett Davis, a Senator from Kentucky, raised a question as to whether or not the managers or the counsel for the defense could interpose any objection to a question by a member of the court.

The Chief Justice [57] said:

The Chief Justice thinks that any objection to the putting of a question by a member of the court must come from the court itself.

Thereupon Mr. Charles D. Drake, a Senator from Missouri, objected to the question.

The Chief Justice said:

The only mode in which an objection to the question can be decided properly is to rule the question admissible or inadmissible; and that is for the Senate. The question of the Senator from Maryland has been proposed unquestionably in good faith, and it addresses itself to the witness in the first instance, and it is for the Senate to determine whether it shall be answered by the witness or not. Senators, the question is whether the question propounded by the Senator from Maryland is admissible.

And the question being taken, there appeared yeas 18, nays 32. So the question was excluded.

2184. Either managers or counsel in an impeachment trial may object to an answer to a question propounded to a witness by a Senator.—On February 11, 1905,[58] in the Senate sitting for the trial of Judge Charles Swayne, a witness A. H. D'Alemberte, was sworn and examined. In the course of the examination a Senator, Mr. Augustus O. Bacon, of Georgia, proposed this question:

Q. Does the law of Florida require the payment of a poll tax from each male citizen of the State who is over 21 and under 55 years of age, without reference to the question whether or not he votes?

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

In the opinion of the managers, that is a question of law, not of fact. I suppose we have a right to object to a question by a Senator, under the rule and we object to that question. It is a matter of law, and I do not suppose the witness is a lawyer.

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[56] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, p. 166.
[57] Salmon P. Chase, of Ohio, Chief Justice.
[58] Third session Fifty-eighth Congress, Record, pp. 2393, 2397, 2399.

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The Presiding Officer [59] said:

If the objection is insisted upon, the Presiding Officer thinks that the question is improper, for the reason that it relates to a matter of law; but the Presiding Officer would suggest that this examination has so far proceeded upon questions of law very largely.

Mr. Henry Cabot Lodge, a Senator from Massachusetts, raised a question as to whether or not the managers might object to a question propounded by a Senator.

The Presiding Officer said:

Perhaps not in the technical way in which objections are made in court, but the Presiding Officer thinks that either the managers on the part of the House or the counsel for the respondent have a right to raise the question, to be decided by the Presiding Officer, as to whether evidence is admissible. * * * The Presiding Officer does not at this time desire to make any binding or irreversible rule, but if such a case can be supposed as that a Senator should put an improper or inadmissible question to a witness the Presiding Officer thinks that that question being raised he would have a right to rule upon it.

Later Mr. Manager Palmer said:

While the witness is coming I wish to submit to the President the authority on which I objected to the question asked by the Senator from Illinois [Mr. Hopkins]. It is a ruling made by Chief Justice Chase in the trial of Andrew Johnson, and is to be found in the second volume of the Congressional Globe, at pages 166, 169, and 170, where it was decided that the managers had a right to object to a question asked by a Senator.

I merely call attention to the authority to show that I was not objecting without some reason.

A little later Mr. Joseph B. Foraker, a Senator from Ohio, said:

I deem it my duty to call attention to the fact that on page 310 of Extracts from Journals of the Senate of the United States of America in Cases of Impeachment I find the following ruling by the Chief Justice.

Mr. Johnson, Senator, having asked a question, objection was made by the managers.

"Mr. Manager Bingham having commenced an argument in support of the objection,

"Mr. Davis raised the question of order that it was not in order for the managers to object to a question propounded by a Member of the Senate.

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling by the Chief Justice was submitted to the Senate and was sustained by the Senate, the rule on that subject being Rule XVIII, Governing Impeachment Trials, which reads as follows:

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer."

In other words, the rule is without qualification; and this is the first time I ever heard it suggested that a court conducting a trial did not have a right to put any question the court might see fit to ask. If there be any ruling such as managers have stated there is, made by the Chief Justice in the course of that trial, I have overlooked it.

Later Mr. Manager Palmer said:

Mr. President, the managers have been asked for the particular authority for making objection to a question asked by a Senator. I refer the Senator from Ohio [Mr. Foraker] to the Congressional Globe, volume 40, trial of Andrew Johnson, page 169, in which the Chief Justice made this ruling. * * * The 13th of April, 1868, page 169. The ruling was as follows:

"The CHIEF JUSTICE. The honorable manager will wait one moment. When a member of the court propounds a question, it seems to the Chief Justice that it

[59] Orville H. Platt, of Connecticut, Presiding Officer.

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is clearly within the competency of the managers to object to the question being put and state the grounds for that objection as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

The Presiding Officer said:

The manager will allow the Presiding Officer to refer to the ruling which was cited by Senator Foraker. It is in these words:

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling seems to be that an objection can not be made to a Senator putting a question, but that the admissibility of the evidence to be given might be objected to and discussed.

Mr. Manager Palmer said:

That is right. That is what we understood. We objected to the admissibility of the answer to such a question, because we did not think it was a legal question.

The Presiding Officer continued:

That is what the Chair understood; not that the managers objected to a question being put by a Senator, but objected to the question being answered.

Mr. Manager Palmer added:

Yes; we objected to its being answered, not to its being asked.

2185. The Senate decided that it might, in an impeachment trial, permit a Senator to interrogate a witness, although both managers and counsel for the respondent objected.—On July 11, 1876,[60] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Thereupon Mr. John A. Logan, a Senator from Illinois, proposed another question.

Mr. Matt H. Carpenter, of counsel for the respondent, objected to the question, and Mr. Manager John A. McMahon, on the part of the House of Representatives seconded the objection.

Mr. Allen G. Thurman, a Senator from Ohio, asked what business the court had to ask a question to which both parties objected.

Mr. Logan said:

I presume that members of the court here stand upon an equality, and that one has as good a right to ask a question as another, provided it is a proper question, couched in proper language. I asked a question a while ago of the witness what the understanding was between him and Mrs. Bower. I did not use the name, but that was it, and he gave the understanding, and in that answer he incidentally remarked that he had an understanding with the former Mrs. Belknap. The question was argued by the managers and counsel for the respondent; the vote was taken by yeas and nays, and the Senate voted that the question should be answered; and the witness did answer the question. In furtherance of that question, I have asked what the understanding was with the former Mrs. Belknap.

Mr. Thurman said:

The House of Representatives here is represented by its managers; the defendant is represented by his counsel; and when both sides agree as to what are the issues upon which they will put in evidence, I really do not see, with entire

[60] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 241, 242.

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respect to the Senator from Illinois and every other Senator, that it is any part of the duty of the Senate which is to sit here as impartial judges to introduce a new line either of prosecution or of defense. I see no reason for it; and if the Senate has erred once, it is no reason why it should err again. If neither the managers on the part of the House nor the counsel for the defendant have seen fit to go into the arrangements, if there were any, between the witness and this deceased lady or this living lady, it is no business of ours to go into them. If it is necessary for the purposes of public justice that they should be gone into and the testimony would be legitimate, it is to be presumed that the House of Representatives, through its managers, would have asked us to hear the testimony. If it were necessary for the defense that the matter should be gone into, it is to be presumed that the counsel for the defense would have introduced it as a defense. It is not for us to supply any deficiency of the prosecution or to supply any deficiency of the defense.

Mr. Oliver P. Morton, of Indiana, said:

I simply want to state that I regard it as the absolute right of this court or any member of it, with the consent of his brother judges or a majority of them, to ask any question; and the idea that the court can be overruled by the counsel on either side agreeing that the question shall not be asked is something entirely new.

The Senate decided, by a vote of yeas 23, nays 17, that the question should be admitted.

2186. Instance wherein both managers and counsel for respondent were permitted to object to questions proposed by Senators.—On April 18, 1868,[61] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent. In the course of the examination, Mr. John Sherman, a Senator from Ohio, proposed in writing this question:

State if, after the 2d of March, 1867, the date of the passage of the tenure-of-office act, the question whether the Secretaries appointed by President Lincoln were included within the provisions of that act came before the Cabinet for discussion; and if so, what opinion was given on this question by members of the Cabinet to the President.

Mr. Manager John A. Bingham objected that the evidence sought to be obtained was incompetent under the decisions of the Senate already made.

The question being taken, there appeared in favor of admitting the testimony 20 yeas, and against 26 nays. So the testimony was not admitted.

2187. On July 11, 1876,[62] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, when Mr. John H. Mitchell, a Senator from Oregon, proposed in writing this question:

Q. Why did you send to W. W. Belknap, Secretary of War, the one-half of the various sums of money received by you from Evans at Fort Sill?

Mr. Matt H. Carpenter, of counsel for the respondent, objected, saying:

Mr. President, the celebrated Jeremiah Mason in the trial of a very important case once said, when a judge put a question to a witness, he being counsel for the defense, that if the question was put on the part of the plaintiff, he objected to it; if it was put on behalf of the defendant, he withdrew it. * * * The Gov-

[61] Second session Fortieth Congress, Senate Journal, p. 913; Globe supplement, p. 238.
[62] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, pp. 237, 238.

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ernment have gone through the examination of this witness; we have cross-examined him; the court has allowed them to go partially into a redirect examination, and they have concluded it. This question put by the managers now would certainly be objectionable, and I presume that we have the same right to object to a question put by the court that we would have if it were put by the managers. * * * They have had one redirect examination, the court overruling our objection to it, to give it to them. Now after this will this court permit the managers to return to that subject and open the examination of this witness? And if they will not permit the managers to do it, will the court do it themselves? If a question can not be objected to when put by one of the court which would be ruled out if put by the counsel, then this is a strange proceeding and we are in a singular situation. I say this of course with entire respect to the Senator who asks the question; but we must have a right to object to the question, and for the purpose of testing whether it is proper or improper, it must be considered as a question put by the managers, and put by the managers at this time, is there the slightest doubt that the Senate would rule it out?

The Senate, without division, determined that the question should be admitted.

The witness replied to it:

Simply because I felt like doing it. It gave me pleasure to do it. I sent him the money as a present always, gratuitously. That is the only reason I had.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, asked:

I should like to ask the witness, in connection with his last answer, whether General Belknap knew, in advance of these remittances from time to time, how large the present was going to be that was to be sent?

Mr. Carpenter said:

Mr. President, I object to that question upon the ground that one man can not swear what another man knows. It is physically and intellectually impossible. If he could say that he told Mr. Belknap a thing, if he could prove any fact, that fact may be proved; but could I be put on the stand to swear what the Senator from Vermont knows upon any subject? I should say he knows all about it, but any particular knowledge on a particular subject I could not be called to swear to. Nobody can.

Mr. Montgomery Blair, also of counsel for respondent, said:

Mr. President and Senators, there is another objection to this question that I hope the Senate will consider before voting that this question shall be admitted, and that is that this witness is a Government witness, and that the interrogatory of the Senator is to impeach the witness on the part of the prosecution. It implies that he has not stated the truth.

The question being submitted, the Senate, without division, decided that the interrogatory should be admitted.

2188. While managers or counsel may argue in objection to a question put to a witness by a Senator in an impeachment trial, the Senator may not reply.—On July 19, 1876,[63] in the Senate sitting for the impeachment trial of William W. Belknap, John S. Evans, post trader at Fort Sill, was called as a witness on behalf of the respondent. It was alleged that Evans had been appointed by respondent through improper influence by one Marsh, who had shared by the terms of a contract in Evans's profits and divided them with respondent.

Mr. Theodore F. Randolph, a Senator from New Jersey, proposed this question to witness:

[63] First session Forty-fourth Congress, Record of trial, p. 275.

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The question is this: What amount of goods did Mr. Evans sell at Fort Sill during any one year pending this contract?

Mr. Matt. H. Carpenter, of counsel for respondent, objected:

The object of that question seems to be to show that he made an improvident contract with Marsh and paid him too much. I submit that that can have no materiality to this case. If the managers trace $500 home to Belknap in the form of a bribe, it is just as complete a case as $50,000. If he paid him an unreasonable bribe, it is no worse than to pay ten cents.

Mr. Randolph said:

I am unfortunately placed to argue the question with the counsel—

The President pro tempore [64] said:

Debate is not in order. The question will be put.

Thereupon, without division, the Senate decided that the question should be admitted.

2189. Rule of the Senate in the Swayne trial permitting managers or counsel to offer motions or raise questions as to evidence and prescribing the manner thereof.—On January 27, 1905,[65] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, of the managers for the House of Representatives, offered the following:

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock p.m.

Later Mr. Charles W. Fairbanks, a Senator from Indiana, said:

We understand that the order which the managers of the House have asked for can not properly be put by them, and I suppose it is the proper practice to regard the order offered as a request. I offer, upon the request of the managers of the House, for present consideration, the order which I send to the desk.

Later, after the Senate had resumed its legislative sessions, Mr. Joseph W. Bailey, of Texas, said:

Mr. President, a moment ago, when the Senate was sitting as a court, it was doubted if the managers on the part of the House are permitted under the rules to make a motion. My own opinion is that nobody but a Senator can make a motion to be voted on by the Senate, but it would be a most anomalous situation if an attorney in any kind of a court could not make motions before that court to be acted on by that court. And for my own guidance—I am sure that other Senators are in much the same frame of mind—I should like to have that question settled. If it would be proper, I should like to have the Judiciary Committee report, or if the Senate prefers, a special committee, what have been the practice and the precedents in that respect.

It was pointed out that the Senate already had appointed a select committee to examine such questions, and that they would consider this question.

On February 3 [66] Mr. Augustus O. Bacon, of Georgia, offered, and the Senate sitting for the trial agreed to, an order as follows:

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the

[64] T. W. Ferry, of Michigan, President pro tempore.
[65] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.
[66] Record, p. 1819.

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Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be directly addressed to the Presiding Officer and not otherwise.

2190. During final argument in the Chase trial the managers claimed and obtained the right to introduce testimony to justify evidence of an impeached witness.—On February 25, 1805,[67] in the high court of impeachments, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, the testimony had been closed, the beginning on behalf of the managers in the final argument had been made, and two of the counsel for the respondent had submitted arguments, when Mr. John Randolph, Jr., of Virginia, chairman of the managers, moved the examination of Hugh Holmes, who would testify in corrobation of the testimony of John Heath, a witness for the managers, whose evidence had been attacked. Mr. Randolph explained that Mr. Holmes did not attend until the evidence for the managers had been concluded. Mr. Randolph further said:

I only state this circumstance in tenderness to the character of the witness, and that Mr. Holmes is ready to prove that, pending the trial of Callender, Mr. Heath did declare to him as having passed in his presence such a conversation as the witness has stated. It is not our wish to press his evidence, because we know that the evidence of a witness thus rebutted can establish nothing material to the prosecution. But we are ready, if the court and counsel for the respondent agree, to receive his testimony.

Mr. Robert G. Harper, counsel for the respondent, said:

It is not for us to say how the honorable managers shall proceed in conducting this prosecution. We have no objection to Mr. Holmes being examined, and we feel perfectly indifferent whether Mr. Heath be abandoned or not. Should Mr. Holmes not be examined, I presume it will be understood that he was offered to support the declaration of Mr. Heath.

Mr. Randolph said it was not intended to abandon Mr. Heath.

Mr. Harper inquired how long Mr. Holmes had been in the city. If correctly informed he had been here three days, and if so, his testimony might have been adduced before the defense on the part of the respondent was made.

Mr. Randolph said the delay in offering Mr. Holmes to the court arose solely from an indisposition to interrupt the counsel for the defendant. The character of Mr. Holmes stood to high to be impeached. It was only when they heard the correctness of Mr. Heath's testimony questioned that the managers deemed it necessary to do that, for the not doing of which they had received the censure of the counsel for the respondent. Mr. Randolph then moved that Hugh Holmes should be sworn.

The President[68] said the reasons assigned for the admission of Mr. Holmes's testimony, so far as they arose from tenderness to the character of Mr. Heath, could have no weight with the court. The only question for them to decide was whether his testimony was or was not material.

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[67] Second session Eighth Congress, Senate Impeachment Journal, p. 523; Annals, p. 541.
[68] Aaron Burr, of New York, Vice-President, and President of the Senate.

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Mr. Joseph H. Nicholson, of Maryland, one of the managers, said he held it to be the right of either party, at any stage of the trial, when the evidence of a witness was impeached, to justify it by the testimony of another witness. He asked the receiving, therefore, of Mr. Holmes's testimony as a matter of right, not of favor.

The yeas and nays were taken on examining Mr. Holmes, and were yeas 21, nays 11.

2191. Instance of a suggestion by the Presiding Officer in the Swayne trial as to the form of a question.—On February 20, 1905,[69] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness on behalf of the managers was questioned by Mr. Manager David A. De Armond, of Missouri:

Q. Now, then, as to the matter of that newspaper article. I understood you to say that you knew nothing whatever about it and that you so stated during the hearing of these contempt proceedings?—A. Yes, sir.

Q. And that Mr. Davis made a similar statement concerning himself?—A. I heard it; yes, sir.

Q. In the court, during the contempt proceedings?—A. Yes, sir.

Q. I will ask you whether there was anything else offered in testimony by those supporting the complaint against you than these two matters?—A. Nothing whatever.

Q. Then I will ask you whether there was anything upon which testimony could have borne in the matter brought out against you?

Mr. John M. Thurston, of counsel for the respondent, objected to this question.

The Presiding Officer [70] said:

In that form the question is hardly admissible. * * * The witness might be asked if he supposed there was anything which was important which was overlooked.

2192. Decision as to the limits within which counsel in an impeachment trial may criticise a witness.—On February 18, 1805,[71] in the high court of impeachments, during the trial of the case of The United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Montgomery, was called and in the course of cross-examination Mr. Robert G. Harper, counsel for the respondent, said:

I will now proceed to show that Mr. Montgomery, in his strong anxiety to get Judge Chase impeached, has remembered things which nobody else remembers, and has heard things which nobody else heard.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

I will ask of this court whether the witnesses we have called are not under their protection?

The President said:

If the counsel, in the testimony they adduce, come up to what they state they can prove, they will not be subject to reproach; if they do not, they merit it.

Mr. Randolph said:

I have no objection to the counsel impugning the veracity of one witness by the evidence of another and descanting upon it, but I think they take an improper liberty when they undertake to say, before it is proved, that what is deposed by a witness never passed.

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[69] Third session Fifty-eighth Congress, Record, pp. 2905, 2906.
[70] Orville H. Platt, of Connecticut, Presiding Officer.
[71] Second session Eighth Congress, Annals, p. 291.

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The President [72] said:

I understand the gentleman to say that he will prove by another witness that what has been deposed never did pass.

Mr. Harper said:

Precisely so, sir.

2193. In the Swayne trial the Presiding Officer generally ruled on questions of evidence instead of submitting them directly to the Senate.—On February 21, 1905,[73] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the Presiding Officer submitted a question relating to the admissibility of evidence, to the Senate directly, without ruling himself. Generally, in the course of this trial the Presiding Officer ruled, and very rarely indeed was the judgment of the Senate asked. The cases wherein the Presiding Officer submitted the question at once to the Senate without ruling himself were rare and exceptional. On February 23 [74] occur several instances when the Presiding Officer submitted the decision at once to the Senate, and thereafter on the few succeeding days he submitted questions with more frequency.

2194. When the judgment of the Senate is asked after the Presiding Officer has ruled on a question of evidence, the form of question is, "Is the evidence admissible?"—On February 14, 1905,[75] in the Senate sitting for the impeachment trial of Judge Charles Swayne a question arose as to an offer of evidence, and the judgment of the Senate was asked by Mr. Joseph W. Bailey, a Senator from Texas. The Presiding Officer said:

Objection was made to the introduction of certain evidence. The offer on the part of the managers of the House to prove what Judge Swayne stated before a committee of the House when he appeared voluntarily before that committee was objected to by counsel for the respondent. The Presiding Officer ruled that without inquiring technically whether it was testimony which Judge Swayne gave, or technically whether this was a criminal court, that the intention of the statute referred to was such as made it proper to exclude the testimony; and from that the Senator from Texas took an appeal.

Mr. Joseph B. Foraker, a Senator from Ohio, raised a question:

Mr. President, I submit it is not technically correct to call it an appeal. The rule provides when the Chair has ruled, it may, if any Senator so requests, submit the question to the Senate. I understand this is simply a request that the question be submitted to the Senate. * * * The question submitted to the Senate should be whether or not the objection of counsel for the respondent shall be sustained. So an affirmative vote would sustain the objection.

Mr. Albert J. Hopkins, a Senator from Illinois, said:

Would not the form under the rule then be as to whether the decision of the Chair shall stand as the judgment of the court?

Mr. Shelby M. Cullom, a Senator from Illinois, said:

I desire to read a paragraph from the trial of the President of the United States years ago:

"The CHIEF JUSTICE. Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decisions as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversation, with the President at or near the time of the

[72] Aaron Burr, of New York, Vice-President, and President of the Senate.
[73] Third session Fifty-eighth Congress, Record, p. 2979.
[74] Record, pp. 3147, 3167.
[75] Third session Fifty-eighth Congress, Record, p. 2540.

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transaction. It is said that this evidence it distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it, but he will submit directly to the Senate the question whether it is admissible or not."

The Presiding Officer [76] said:

This is the rule:

"And the presiding officer on the trial may rule [on] all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

The presiding officer was of opinion that the question was whether the evidence was admissible. * * * The presiding officer then submits to the Senate the question whether the evidence offered by the managers on the part of the House is admissible.

2195. The right to ask a decision of the Senate after the Presiding Officer has ruled preliminarily on evidence belongs to a Senator, but not to counsel.—On July 7, 1876,[77] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question by counsel for the respondent to a witness was objected to by Mr. Manager John A. McMahon.

The President pro tempore [78] said:

The Chair sustains the objection.

Mr. Matt. H. Carpenter, of counsel for respondent, asked if he might appeal to the Senate.

The President pro tempore [78] held that he might not, but said that a Senator might have the point submitted to the Senate.

2196. The Senate finally decided in the Swayne trial that under the rule debate on the admission of evidence might not take place in open Senate.—On February 14, 1905,[79] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the decision of the Senate was asked on a question relating to the admissibility of evidence. Mr. Joseph W. Bailey, a Senator from Texas, proposed to debate the question, when a question as to debate arose, and the Presiding Officer [80] said:

In the opinion of the Presiding Officer, the matter can be discussed in the Senate upon the appeal and the vote be taken here, or the Senate can, if it so desires, retire to its conference chamber for discussion. Either course may be pursued, according to the wish of the Senate.

After Mr. Bailey had proceeded in debate for some time, Mr. Augustus O. Bacon, a Senator from Georgia, cited Rules VII and XXIII, saying:

The rule is peremptory that except when the doors are closed there must be no debate, short or long. * * * I read Rule VII to show that Rule XXIII does not in any manner modify the provision of Rule VII as to debate except when the Senate is in secret session; "when the doors shall have been closed," in the language of the rule. I do not think that debate upon any question which may arise is in order. Senators will perceive necessarily that a contrary rule would in its operations protract the session of a court of impeachment beyond the possibility of any practical termination.

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[76] Orville H. Platt, of Connecticut, Presiding Officer.
[77] First session Forty-fourth Congress, Record of trial, p. 192.
[78] T. W. Ferry, of Michigan, President pro tempore.
[79] Third session Fifty-eighth Congress, Record, pp. 2538, 2539.
[80] Orville H. Platt, of Connecticut, Presiding Officer.

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The Presiding Officer said:

The Presiding Officer is of opinion that the point of order taken by the Senator from Georgia is well taken, and that the only exception is that contained in Rule VII. Rule XXIII provides:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation."

The exception in Rule VII is that upon all such questions the vote shall be without a division. But Rule XXIII provides that all orders and decisions shall be by yeas and nays. The exception referred to in Rule VII is upon questions relating to the introduction of evidence and incidental questions; if the vote of the Senate is asked, it may be decided without a division, unless the yeas and nays are demanded.

The Presiding Officer thinks the point is well taken.

2197. In an argument as to the admissibility of evidence, it is not proper to read the very evidence objected to.—On February 23, 1905,[81] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, proposed to submit as evidence certain extracts from the official record of Congressional debates.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, having objected, Mr. Thurston said:

I am offering the proceedings. They directly bear upon the construction of this act, and I have a right to refer to the Congressional Record in the debates, at least; for instance, Mr. Allen, in the Senate, when this provision was under consideration, offered the following——

Mr. Manager Olmsted said:

I object to the gentleman putting in an argument the evidence to which we object. I understand he was about to read from the debates.

The Presiding Officer [82] said:

The Presiding Officer thinks that counsel can make the argument that he desires to make without reading the Congressional debates. He desires to show the nature of the evidence which he proposes to introduce by introducing these debates. They are something more than debates. They are action upon amendments and various motions that were made. The Presiding Officer thinks that that can be done without any actual reading of the debates. There can be statements by counsel as to the particular matter to which he wishes to call the attention of the Senate without reading the debates.

2198. The Chief Justice held, in the Johnson trial, that the offering of evidence might not be interrupted by a question relating to business incident to the trial or to legislative sessions.—On April 3, 1868,[83] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the managers on behalf of the House of Representatives were engaged in offering certain documentary evidence, when Mr. Henry B. Anthony, a Senator from Rhode Island, proposed to call up for consideration a matter of business pending in a legislative session of the Senate.

The Chief Justice [84] said:

It is not in order to call up any business transacted in legislative session.

2199. In the Belknap trial, by consent of both sides, a statement of what would be proven by an absent witness was admitted,

[81] Third session Fifty-eighth Congress, Record, pp. 3165, 3166.
[82] Orville H. Platt, of Connecticut, Presiding Officer.
[83] Second session Fortieth Congress, Globe supplement, p. 99.
[84] Salmon P. Chase, of Ohio, Chief Justice.

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subject to objection as to its relevancy.—On July 10, 1876,[85] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for the reading of two telegrams, one from Gen. W. T. Sherman and the other from Gen. P. H. Sheridan, setting forth that urgent military necessity rendered it desirable that the latter should not leave his post to testify before the Senate in this case. The telegrams having been read, Mr. Carpenter said:

In consequence of those telegrams, and not wishing to interrupt the public service unnecessarily, we have agreed, if the court will permit us, to let it go upon the record, as follows:

I. It is admitted that Lieut. Gen. Phil Sheridan would, if present, testify to the good official character of the respondent while Secretary of War.

II. That in regard to all the applications made for leave to sell liquors at the military posts the matter was referred by the Secretary of War to him, and by him investigated and reported on, and his report in all cases was adopted by the Secretary of War.

III. And that a part of a letter from him, Sheridan, to the Secretary of War, dated March 29, 1872, may be read in evidence and that the same, and said admission, shall be taken and regarded as testimony in this cause with the same effect as though General Sheridan had appeared and testified to the same effect.

It is understood, of course, that all these different points are subject to the objection that they are irrelevant or incompetent if the counsel on the other side chooses to raise that objection.

Mr. Manager John A. McMahon said:

We admit that he would be asked these questions and would answer in that way, provided they were competent or material.

2200. The presentation and reading of a document during introduction of evidence in an impeachment trial was held not to preclude an objection as to its admissibility.—On April 2, 1868,[86] in the Senate sitting for the trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter from President Johnson to Gen. U.S. Grant.

The letter having been read, Mr. Henry Stanbery, of counsel for the President, asked that certain documents referred to by the letter as accompanying it be read. The managers having announced that they did not propose to offer the accompanying documents, Mr. Stanbery entered an objection to the admission of the letter without the accompanying documents.

Mr. Manager Wilson raised the point that the objection came too late, since the letter had been submitted and read and was in evidence.

The Chief Justice [87] said:

The Chief Justice is of the opinion that objection may now be taken.

2201. In the Belknap trial the Presiding Officer, on request of respondent's counsel, required the reading in full of letters presented in evidence.—On July 8, 1876,[88] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, in the course of the introduction of testimony, offered a series of letters, the reading of which began.

Mr. George G. Wright, a Senator from Iowa, while admitting that the counsel had the right to have the letters read at length, asked if, in order to save time, they might not be regarded as read.

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[85] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, p. 219.
[86] Second session Fortieth Congress, Globe Supplement, pp. 81, 82.
[87] Salmon P. Chase, of Ohio, Chief Justice.
[88] First session Forty-fourth Congress, Record of trial, p. 206.

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Mr. Matt. H. Carpenter, of counsel for the respondent, objected and demanded that the letters be read in full.

The President pro tempore [89] directed the reading to proceed.

2202. The Chief Justice held, in the Johnson trial, that offer of documentary proof should state its nature only, but that the Senate might order it to be read in full before acting on the objection.—On April 18, 1868,[90] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent, and testified that Foster Blodgett, postmaster at Augusta, Ga., had been suspended from office on complaints both written and verbal. Certified copies of the official papers relating to the removal were then offered in evidence by Mr. William M. Evarts, of counsel for the respondent.

Mr. Manager Benjamin F. Butler, having intimated that there might be objection, the Chief Justice [91] said:

The counsel for the President will state what they propose to prove in writing. * * * It will be necessary to state what the order and letters are; otherwise the court will be unable to judge of their admissibility.

Thereupon Mr. John Sherman, a Senator from Ohio, said:

I think we have a right to ask for the reading of the letters to know what we are called upon to vote.

The Chief Justice said:

The Senate undoubtedly have a right to order the letters to be read. * * * The usual mode of proposing to prove is by stating the nature of the proof proposed to be offered, and then, upon an objection, the Senate decides whether proof of that description can be introduced. It is not usual to read the proof itself. Undoubtedly it is competent for the Senate to order it to be read.

Mr. Evarts thereupon made this offer in writing:

We offer in evidence the official action of the Post-Office Department in the removal of Mr. Blodgett, which removal was put in evidence by oral testimony by the managers.

Mr. Butler having withdrawn all objection, the papers were then offered and read.

2203. Decisions as to the extent to which a witness in an impeachment trial may use memoranda to refresh his memory.—On February 11, 1805,[92] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, George Hay was sworn as a witness, and made this statement:

The greater part of the evidence I am to deliver relates to what was said by me as counsel for J. T. Callender, who was indicted for a libel on the President of the United States, and what was said by one of the judges; for I do not recollect to have heard the voice of Judge Griffin at any time during the trial. In order to make this statement as accurate as possible, as my memory is not strong, it is necessary to resort to a statement made by myself and the counsel associated with me in the defense of J. T. Callender, which I now hold in my hand, and every part of which, according to my best recollection, is correct.

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[89] T. W. Ferry, of Michigan, President pro tempore.
[90] Second session Fortieth Congress, Globe Supplement, p. 236.
[91] Salmon P. Chase, of Ohio, Chief Justice.
[92] Second session Eighth Congress, Annals, pp. 193–195; Senate Impeachment Journal, p. 518.

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Mr. Robert G. Harper, counsel for the respondent, here interrupted Mr. Hay and said:

The witness may refer to anything done by himself at the time the occurrences happened which he relates. But I submit it to the court how correct it is to refer to what was not done by him, or done at the time.

The President asked Mr. Hay whether the notes were taken by him. Mr. Hay said:

The statement was made by different persons. Some parts were made by myself, perhaps the greater part; the rest by Mr. Nicholas and Mr. Wirt. I believe I shall be able to state from it every material occurrence which took place at the time. With regard to those parts of the statement not made by me, a reference to them will call to my recollection the facts mentioned in such parts. If I state anything which I do not distinctly recollect, upon adverting to the statement, I will explain the actual situation of my mind on that point.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said:

If I understand the witness, it is not his intention to give the paper in his hand as evidence, but merely to refer to it for the purpose of refreshing his memory.

Mr. Harper said:

I do not understand the way in which it is meant to use the paper. I apprehend that it is a rule of evidence that nothing but notes made at the time of the transactions related can be received as evidence. I therefore am of opinion that a reference to this statement is inadmissible, because a part of it is made by others, and none of it made at the time.

Mr. Caesar A. Rodney, of Delaware, one of the managers, said:

When we advert to what has been stated by the witness, who says he does not mean to state in evidence anything in the paper of which he has not, independently of it, a distinct recollection, I think it is within the law to admit him to avail himself of it. I apprehend that had I attended the trial of Callender and taken minutes, and others had attended and not taken notes, if by recurring to my notes there should be recalled to their recollection facts so distinctly that they could swear to them before the court, it would be competent to admit their reference to such notes.

Mr. George W. Campbell, of Tennessee, one of the managers, inquired whether the objection was not confined to that part of the statement not made by the witness?

Mr. Harper said the objection related to the whole of it.

Mr. Campbell believed that a witness might use any memorandum to refresh his memory; and that it was not necessary that it should be made at the point of time when the events happened. It is sufficient if made at a time when his remembrance of the facts was correct. With regard to that part not taken by himself, if he perused it at a time so shortly after the events related, as to be able to determine it accurate, and now recognize the memorandum to be the same, it was sufficient.

Mr. Luther Martin, counsel for the respondent, said he had been many years in the practice of the law. The rules of evidence were probably different in different States. But he had always supposed that a witness could not be permitted to use any memorandum not made by himself, or at the time of the events related, or near it. He may, before he comes into court, consult any memorandum for the purpose of refreshing his memory, but not in court.

The President [93] said:

The witness proposes to make use of a memorandum under the circumstances which he has stated. The question is, shall the witness be permitted to make use of it?

[93] Aaron Burr, of New York, Vice-President, and President of the Senate.

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Mr. John Quincy Adams, of Massachusetts, a Senator, said:

I am not prepared to answer that question at present, not knowing the nature of the minutes the witness proposes to use. I therefore move that the Senate retire before the question is taken.

The question on retiring was taken, and on division lost.

Mr. Adams said he wished to see the papers before he voted.

The President asked Mr. Hay whether it was in his own handwriting.

Mr. Hay replied that it was not; but that it was written by a clerk from a printed statement.

The President asked:

Have you the parts made by yourself separate?

Mr. Hay said he had not.

The President then put the question:

Shall the witness be permitted to make use of, as a memorandum, a paper containing a statement of facts, composed by himself and other gentlemen, in relation to the trial of James T. Callender, sometime after the trial, the paper proposed to be made use of being a copy made by his clerk from a printed paper which contained the said statement.

And there appeared yeas 16, nays 18.

2204. On April 3, 1868,[94] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William N. Hudson was sworn and examined by the managers for the House of Representatives as to a certain speech of the President which he assisted in reporting at Cleveland, Ohio. Being questioned as to certain interruptions which the President experienced while speaking, the witness was told by Mr. Manager Butler that he might refresh his memory from any memorandum or copy of a memorandum. Witness then proceeded to use a copy of the newspaper in which the report was printed.

Mr. William M. Evarts, of counsel for the President, objected that the witness should speak by his recollection if he could. If he could not, he might refresh it by the presence of a memorandum which he made at the time.

The Chief Justice[95] having drawn from the witness that the memorandum made by him at the time was lost, and that the newspaper contained a copy of that memorandum, ruled as follows:

It is inquired on the part of the managers what interruptions there were, and the witness is requested to look at a memorandum made at the time in order to refresh his memory. Of that memorandum he has no copy, but he made one at the time, and it is lost. The Chief Justice rules that he is entitled to look at a paper which he knows to be a true copy of that memorandum. If there is any objection to that ruling, the question will be put to the Senate.

2205. It was held in the Peck trial that a witness might correct orally testimony already given by himself.

In correcting testimony previously given in an impeachment trial a witness was not permitted to put in a paper made up in part from the recollections of other persons.

On January 17, 1931,[96] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, William C.

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[94] Second session Fortieth Congress, Globe Supplement, pp. 102, 103.
[95] Salmon P. Chase, of Ohio, Chief Justice.
[96] Second session Twenty-first Congress, Report of the trial of James H. Peck, pp. 286, 287.

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Carr presented himself before the court and stated that since the evidence had been closed a written statement of the testimony had been shown to him, from which he perceived that the evidence which he had given was in one point defective, from want of remembrance of certain circumstances. He now therefore prayed leave of the court to present a condensed statement of the facts which had been omitted. He had reduced them to writing under the solemnity of an oath. In doing so he had not chosen to rely altogether upon his own recollection, but had referred to that of two other witnesses in this cause, and also had consulted two other gentlemen concerned in the matter. He hoped that the court would deem this paper admissible. If not, he wished to be subjected to oral examination.

Objection being made by the managers on behalf of the House of Representatives, the paper was withdrawn and the witness was examined orally.

On January 11,[97] B. C. Lucas had presented himself and addressed the court as follows:

> I find it incumbent upon me to suggest to the court that since I gave my testimony some facts have occurred to my recollection which then escaped my memory.

Mr. Jonathan Meredith, counsel for the respondent, said:

> The witness appears with a view of explaining or supplying a defect in his testimony as before delivered.

The President of the court [98] said:

> The witness has a right to make an explanation of his testimony.

2206. Instance wherein depositions offered in an impeachment trial were purged of matters in conflict with the rule laid down as to evidence.—On January 10, 1831,[99] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, Mr. Jonathan Meredith, counsel for the respondent, offered in evidence and read certain depositions. He stated that in consequence of decisions just made by the court of impeachment, relative to the admissibility of evidence, he had stricken from the depositions, which had been taken in Missouri, all those portions which were covered by the principles of the decision. The depositions, he said, had been examined jointly by the managers for the House of Representatives and himself, and the portions to be expunged had been mutually agreed upon.

2207. The Senate struck from the record of an impeachment trial certain statements of fact introduced by a manager in argument, without support of evidence.

On an order presented by a Senator in the course of an impeachment trial it was held that Senators might debate only in secret session.

An order affecting the conduct of a manager being presented during an impeachment trial, he was permitted to explain.

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[97] Report of trial of James H. Peck, p. 279.
[98] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.
[99] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, p. 239.

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On April 16, 1868,[100] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of a speech of protest against the delays of the proceedings, introduced certain tabular statements of the sales of gold by the Government, with the object of supporting his claim that the delay in the trial of the President was reacting unfavorably on the country. These statements were printed in the Globe for that day.

On April 17, the Senate having convened for the trial, Mr. Orris S. Ferry, a Senator from Connecticut, offered the following:

Whereas there appear in the proceedings of the Senate of yesterday as published in the Globe of this morning certain tabular statements incorporated in the remarks of Mr. Manager Butler upon the question of adjournment, which tabular statements were neither spoken of in the discussion nor offered or received in evidence: Therefore,

Ordered, That such tabular statements be omitted from the proceedings of the trial as published by rule of the Senate.

Mr. Thomas A. Hendricks, of Indiana, asked if it would be in order for a Senator to defend the Secretary of the Treasury against the attacks of the manager.

The Chief Justice[1] said that the rules positively prohibited debate. He said, however:

The question of order is made by the resolution proposed by the Senator from Connecticut. Upon that question of order, if the Senate desire to debate, it will be proper that it should retire for consultation. If no Senator moves that order, the Chair conceives that it is proper that the honorable manager should be heard in explanation.

Mr. Manager Butler thereupon made a brief explanation.

The order proposed by Mr. Ferry was then agreed to without division or debate.

2208. Having ascertained that certain testimony was within the scope of the articles of impeachment, the Senate reversed a decision that the testimony was immaterial.

Discussion as to whether or not the cross-examination in an impeachment trial may go beyond the scope of the direct examination.

Instance wherein a President pro tempore presiding at an impeachment trial made a decision as to evidence.

On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, General Irvin McDowell, a witness for the Managers, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent. It had been charged against the respondent that he had appointed one Marsh to be post trader at Fort Sill, but that the name of one Evans had been substituted, said Evans having contracted with Marsh to share with him the profits, while Marsh remained away from Fort Sill and at his home in New York, and, it was charged, shared the money sent by Evans with the respond-

[100] Second session Fortieth Congress, Senate Journal, pp. 907, 908; Globe supplement, pp. 209, 210.

[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Senate Journal, pp. 962, 963; Record of trial, pp. 190–192.

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ent. The witness, by direction of the Secretary of War, had drawn an order relating to absentee post traders. The examination proceeded thus:

Q. (By Mr. Carpenter). In regard to the post trader residing at the post, was there any object in that except to keep him at all times subject to military regulation and bring him more nearly within the control of the men who ought to control—the military officers?—A. My own view in drawing up that order was aimed at the question in hand of there being what I supposed to be a post trader at Fort Sill residing in New York.

Q. Would it make any difference whether he resided in New York or any other place, provided the rates at which he must sell were fixed?—A. I do not know whether it would or not.

Q. Can you conceive any difference?—A. I will only say what was in my mind at the time I drew the order up, that it was with reference to correcting an admitted abuse.

Q. The abuse, as you understood it, was sales at extravagant prices, was it not?—A. No; it was a man holding a place and exacting or receiving a large sum of money for it, having no capital, and doing no service for the money he received.

Q. Is there any way that that could injure the soldier or the country, unless he charged higher prices in consequence of that arrangement?

Mr. Manager John A. McMahon objected to this question, saying:

The objection we make to the question is that it is an endeavor to exculpate the accused by simply proving that he did not hurt the soldiers, although he may have hurt Evans. It seems to me that in the trial of a person for official malfeasance in an impeachment case, if we prove that the Secretary of War is in a corrupt combination with a person who has procured an appointment, by which the person who gets the appointment, for example—and I will give the example, Evans—is to divide the money that Evans may be able to force out of this person, to say that that is innocent simply because it does not raise the price of provisions at the garrison or the price of thread or cotton or whatever else may be wanted there, is certainly to the managers something new in the development of this case and of the theory of the defense. We do not care whether he raised the price of provisions a copper, from our standpoint.

Mr. Montgomery Blair, of council for the respondent, argued:

Mr. President and Senators, I beg to call the attention of the court to the fact that the gentleman in the close of his speech, and his colleague in the opening of his, assumed here as proved and established before this court the very thing that they have yet to prove, of which there is not a scintilla of proof before the court. He says, of course, if they prove that this defendant received this money it is an impeachable offense, and it does not make any difference what this order was drawn for. He goes back constantly harping on that and repeating it as the substance of the thing proved, when it remains yet to be proved, and when the question before this court bears directly upon that question, to show that by the course of conduct adopted by this defendant he could not have known that there was any such contract in existence between these parties.

The effort which we are here now making and the effect of this proof is as positive as it can be made to negative the assumption upon which these gentlemen are asking these questions. Is it not legitimate for us to ask this witness—an experienced officer of the Army, who himself did call upon the Secretary to inform him of this evil in existence and to suggest remedies for it—whether or not the remedy which he himself suggested was not adequate to the evil which he undertook to meet? The question whether the trader lived at the post or anywhere else is, as we expect to show, utterly immaterial; and yet we see that that circumstance was made to figure in the opening of this argument, and is continued to this moment, as the only way of escape from the conclusion and weight of this testimony that the defendant misrepresented to the officer who drew this order the fact that the trader resided not at the post but in New York.

The witness has not said any such thing; he has not said at all that this defendant represented to him any such thing. He has not said that, to begin with. Those are words put into his mouth by these gentlemen. He has not asserted at any time that the defendant told him that the trader lived in New York and that this was carried on for that purpose. He says, to be sure, that, as he now re-

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collects it, he understood the fact to be that he did reside somewhere else; but we will show him and show this court before we get through that in that his recollection is mistaken. We will show him that he knew then, at the time, that the trader did not live in New York, but lived at the post. Hence this totally immaterial circumstance in its bearing upon this order is utterly swept out of the way, and the testimony will be left to bear with its whole force upon the fact that this defendant did not know and could not know of the existence of this contract which is the basis of the proceedings.

I therefore insist that this is a principal material question to be answered by the witness, and the fact of the resistance to it makes it manifest to the court that it is a pretty material question.

The question being submitted to the Senate, the question was excluded; yeas 20, nays 31. So the Senate sustained the objection.

Before the above vote had been taken Mr. Samuel J. R. McMillan, a Senator from Minnesota, had briefly called attention to the fact that in one of the articles of impeachment it was charged that Evans was retained in office by the Secretary of War not only corruptly, but that his retention there was "to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States," etc., and suggested that although that issue might not be the only issue in the case, it was an issue that might be a material one, and upon which the Senate would have to pass in their finding.

Soon after the vote,[3] the same witness being under cross-examination, Mr. Carpenter asked:

It is charged in the third article of impeachment that the things alleged to have been done there—that is, the making of this agreement between Evans and Marsh—had been to the great injury and damage of the officers and soldiers of the Army of the United States stationed at that post. In what way could such contract injure the officers of the United States?

Mr. Manager McMahon having objected, the President pro tempore[4] sustained the objection on the ground that a similar question had already been ruled out.

Mr. Carpenter having protested and asked for a hearing, Mr. A. S. Merrimon, a Senator from North Carolina, asked for a vote on the ruling of the Chair, and the President pro tempore submitted the question:

Shall this interrogatory be admitted?

In arguing, Mr. Manager McMahon said:

We have yet offered no proof in this case to show that this has been detrimental to the service of the United States in the view in which the ethics of the gentleman seem to indicate to him may be important. It is a matter really for him in the defense if there is anything in it; and he has no right when we put a witness upon the stand to go into his substantive defense on that point.

The second objection we have in this case is the one which the Senate has already decided. Suppose that we should, taking an indictment, find in that indictment that the offense charged was alleged to be against the peace and dignity of the State of Ohio, or the State of New York, or against the commonwealth; and you were to put a witness on the stand and attempt to prove that it was not against the peace and dignity of the State of Ohio or the State of New York, because it was done in a corner where the State did not see it or had nothing to do with it, and would not know it unless one of the parties told it. It seems to me that it is entirely irrelevant, and it certainly strikes me as a new argument in morals that it is not improper, not an impeachable offense, for a Secretary of War

[3] Senate Journal, p. 963; Record of trial, pp. 192–194.
[4] T. W. Ferry, President pro tempore.

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or a Secretary of the Navy to dole out his offices to the men that will make the best bargain with him, without reference to the question whether it may be injurious to the public service or not.

Mr. Carpenter argued—

there is, as every lawyer knows, a conflict in the decisions in England and in some of the States of this country in regard to the extent which a cross-examination may go. The rule in England, I understand to be, and in many of the States, that when a witness is called upon the stand, the other party may cross-examine him as to anything pertinent to the issue. The rule in other States is the reverse, and the rule I am bound to say in the Supreme Court of the United States is that you can only cross-examine as to matters referred to by the direct examination. But I submit to the Senate that in this trial, circumstanced as we are, with many army officers in attendance here whose public duties, as important as the duties of any officer, require their immediate return, and who are staying here every day to the prejudice of the public service, that rule, which after all is one in the discretion of the court, should in this case be, as I understand the English rule to be, that we may ask any witness called to the stand any question pertinent to the issue. There are many advantages in this. In the first place, it will place before the Senate in a compact form most of the testimony upon a particular subject.

In the next place, it will be a great convenience to all these witnesses. I do not understand, however, that I am now going at all beyond the scope of the direct examination. I make this remark because the question will undoubtedly arise hereafter as to other witnesses.

Now the managers say they have not as yet introduced any proof to show that this arrangement was detrimental to anybody. If they admit that it was not, then I do not wish to take a moment of your time in proving that it was not. If they concede that not a soldier paid one cent more for any article that was sold at that post in consequence of this arrangement between Marsh and Evans, that is the end of it. That is all I want to show by this testimony; but we are able to show, and shall if permitted, that notwithstanding this arrangement between Evans and Marsh, Evans never increased his prices on a single article. He has, as he has sworn elsewhere, upon the general average of his prices, charged less than he did before the arrangement made with Marsh.

The question being put on admitting the interrogatory, it was decided in the negative without division.

A little later,[5] the same witness having testified to his official relations with the respondent Mr. Carpenter asked, on cross-examination:

What has been his character as Secretary of War?

Mr. Manager McMahon said:

We object to this question, and will state our objection to the Senate. I think this is clearly substantive matter of defense, and must come into the trial of this case when the defendant opens his side of the case; but I will say to the gentleman here, though it may not waive the proof upon his part, that the managers upon their part, as I understand, are perfectly willing to concede that up to the time of the development of these matters his character was as good as could be desired or wished.

Mr. Carpenter said:

This question, Mr. President and Senators, falls within the class of questions to which I before referred. Of course it is not a cross-examination, but if not answered now, it may make it necessary to keep General McDowell here for several days before it can be put in. I therefore offer it now and let the Senate rule upon it, and then, of course, we shall know exactly what course to take in regard to other evidence from other witnesses.

The Senate, without division, decided that the question should be admitted.

[5] Senate Journal, p. 963; Record of trial, p. 195.

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On July 19 [6] John S. Evans, the post trader at Fort Sill, was a witness and was asked this question by Mr. Carpenter:

After you returned to Fort Sill and after that contract made between you and Mr. Marsh, by which you bound yourself to pay him sums of money on dates fixed in the contract, did you put up the prices of your goods at the fort?

Mr. Manager McMahon objected that the Senate had already decided that this line of inquiry was not permissible.

Mr. Carpenter argued:

The fourth article, if I remember the number rightly, charges that in consequence of this arrangement between Marsh and Evans the soldiers and officers of the Union Army were defrauded and compelled to pay extravagant and exorbitant prices. Now we offer to show that that is not true. Let the managers strike it out of the articles and we do not care for the proof. If it remains in the articles, we offer to disprove it and will prove by this witness that he not only did not increase his prices, but that they were absolutely lower from that time out until he was removed than they had ever been before, and not, as he expresses it, the one-tenth part of 1 cent was added to the price of goods sold to the soldiers in consequence of that arrangement.

The Senate, by a vote of yeas 26, nays 13, decided that the question should be admitted.

2209. In the Belknap trial the Senate permitted a redirect examination which was not responsive to the facts elicited in cross-examination.—On July 11, 1876,[7] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was, after the direct examination, cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent.

At the conclusion of this cross-examination, Mr. John A. McMahon, of the managers on the part of the House of Representatives, resumed examination, which proceeded:

Do you remember upon any occasion when Evans & Co. made payment in a check of Northrop & Chick to you for $500?

Mr. Montgomery Blair, of counsel for the respondent, objected to the question, for reasons stated by Mr. Carpenter:

We have simply cross-examined this witness. We have shown nothing whatever, nor have we attempted to show anything whatever, except what is legitimate matter of cross-examination. They may reexamine in regard to the new matters we have called out in cross-examination, but nothing else. They can not go on now and by this witness attempt to show any consideration or anything of that kind, because that is a part of their case; they have examined the witness upon that subject and called out from him such evidence as they could and passed him over for cross-examination, and they can not return to it now.

Mr. Allen G. Thurman, a Senator from Ohio, suggested:

I wish to suggest that even if the question is not strictly responsive to the cross-examination it is in the discretion of the court to permit it to be answered.

The question being put to the Senate, "Shall said interrogatory be allowed," it was decided in the affirmative without division.

2210. In the Swayne trial it was held that cross-examination should be responsive to the examination in chief.—On February 20, 1905,[8] in the Senate sitting for the impeachment trial of Judge

[6] Senate Journal, p. 982; Record of trial, pp. 279, 280.
[7] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, p. 237.
[8] Third session Fifty-eighth Congress, Record, p. 2900.

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Charles Swayne, a witness. Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, and the following occurred:

Q. As your associate, did he have authority to sign your name, together with his own, as counsel in the matter of these proceedings?—A. He had not—not that I recollect.

Mr. THURSTON (handing paper to Mr. Manager Olmsted). As a part of our cross-examination we offer this paper in evidence.

The paper, which was afterwards read, was as follows:

LAW NO. 72, IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, MRS. FLORIDA M'GUIRE V. PENSACOLA CITY COMPANY ET AL.

Hon. F. W. MARSH,
Clerk United States Circuit Court, Northern District of Florida.

DEAR SIR: Please enter the above cause on the trial or call docket for trial at the coming term of court.

LOUIS P. PAQUET,
SIMEON BELDEN,
Attorneys for Plaintiff

PENSACOLA, FLA., *October 28, 1901.*

The Manager David A. De Armond, of Missouri, suggested an objection.

Mr. Thurston said:

If I understand evidence, a paper which is a legitimate part of the res gestæ, of the transaction upon which the witness was examined in chief, may be offered when identified as a part of the cross-examination. We may never desire to present any case on our side, but we can not tell until we have the evidence on the other side in.

Mr. Manager De Armond said:

Mr. President, we do not want to be understood as conceding the proposition which the counsel for the respondent has just stated. The question of the admissibility of a paper is a question that will have to be determined when it is offered; and, of course, if a paper could be introduced as a matter of cross-examination, the question of its competency could not be considered, or there would have to be delay to consider the admissibility of something offered by the opposite side when we are offering our testimony. But as to this paper, and only as to this paper, we do not care.

The Presiding Officer [9] said:

The Presiding Officer understands it is offered merely as a part of the cross-examination. * * * Whether it becomes admissible or pertinent in any other view of the case is a matter to be determined afterwards.

Later, on the same day,[10] and during the cross-examination of the same witness, the following occurred:

Q. You afterwards tried that same case, after it was rebrought, in that same court?—A. Yes, sir.

Q. And there you had every opportunity to secure your witnesses, did you not?—A. We had all facilities on that trial.

Q. You got all the witnesses you wanted?—A. I think we did.

Q. I will ask you to examine this paper [handing paper to witness] and see if it is the præcipe for witnesses filed by you as the witnesses you desire subpœnaed for that trial of the case when it did come on?—A. I suppose this is the list. I did not make it out: neither did I sign it.

Q. Signed by your associate, Mr. Davis, for himself and yourself?—A. I think so.

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[9] Orville H. Platt, of Connecticut, Presiding Officer.
[10] Record, pp. 2901, 2902.

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Mr. Thurston said:

Mr. President, it is not necessary to introduce this original paper in evidence, as it already constitutes a part of the record that the other side has put in. Possibly I may be mistaken; the whole record may not have gone in. I ask to have read the names of these witnesses and their residences as showing that all their witnesses, very few in number, resided immediately in and about the court-house at Pensacola.

The Presiding Officer said:

The Presiding Officer has some trouble about having these documents read by the Secretary. Counsel undoubtedly have a right to ask the witness on cross-examination, the witness having testified that there were forty or fifty witnesses, how many witnesses were used when the case came to trial. But the Presiding Officer can not see how it is proper at this time to have this part of the record read. The cross-examination can proceed without the introduction of the paper.

Mr. Thurston said:

Mr. President, we submit to the ruling. We will offer the paper in our own time, when that comes.

2211. On February 20, 1905,[11] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, when the following occurred:

Q. This contempt proceeding was brought jointly against you, Davis, and Paquet, was it not?—A. Yes, sir.

Q. At the time you have spoken of it was only tried as to Davis and yourself?—A. Yes, sir.

Q. Further proceedings were thereafter had in that case against your associate, Mr. Paquet, were they not?—A. Other proceedings were had later on.

Q. And those resulted in his making and filing a written apology, did they not?

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, we are about to object to that. There is a better way of proving that, if it is true, and then it has nothing to do with the case, anyhow. There is no proceeding against Judge Swayne here regarding what he did or did not do with respect to Judge Paquet, and even if it is important to ask what he did or did not, or why he did or did not do it, there is a better way of showing it.

Mr. Thurston said:

I offered it as a part of the res gestæ.

The Presiding Officer[12] said:

The Presiding Officer does not see how that is a part of the cross-examination of this witness upon anything he said. * * * It may become admissible when counsel for the respondent take up the case. The Presiding Officer does not see how it is cross-examination.

2212. Rulings in the Swayne trial as to right of counsel of respondent to introduce documents in evidence during their cross-examination of witnesses for the managers.—On February 15, 1905,[13] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the managers, Elza T. Davis, was under cross-examination by Mr. Anthony Higgins, of counsel for the respondent, when these questions were asked and answered:

Q. (Producing paper.) Mr. Davis, will you kindly look at the paper I hand you and say whether or not that is your signature?

A. (After examining paper.) Yes, sir; that is my signature.

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[11] Third session Fifty-eighth Congress, Record, p. 2905.
[12] Orville H. Platt, of Connecticut, Presiding Officer.
[13] Third session Fifty-eighth Congress, Record, p. 2622.

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Q. Is that a paper presented for you in the United States circuit court for the fifth judicial circuit, relating to the habeas corpus?

A. I do not think it was presented in my case. I think that is an affidavit which was prepared in New Orleans, which Judge Paquet had prepared, and which I signed.

Mr. HIGGINS. If the court please, this is an original paper, and I offer in evidence.

Mr. Manager David A. De Armond, of Missouri, objected that the paper might not thus be introduced in evidence.

The Presiding Officer [12] said:

The Presiding Officer thinks that it is hardly proper to offer this document in evidence on the part of counsel at this time. If they desire to cross-examine the witness upon anything contained in this document, they can do so without offering it formally as evidence now. * * * The Presiding Officer understands that the witness under cross-examination has been asked if a certain document bears his signature, and he says that it does. The Presiding Officer supposes that it is entirely proper for counsel upon cross-examination to ask him any proper question relating to what is in the document, but that this is not the time to offer it in evidence.

2213. Instance wherein during cross-examination in an impeachment trial the Senate sustained objection to evidence on a point not touched in direct examination and of doubtful pertinency.—On July 10, 1876,[14] in the Senate sitting for the impeachment of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. A question arose as to whether or not respondent had ordered witness to a Dakota station as a punishment for testimony given before a committee of the House of Representatives in relation to the post tradership at Fort Sill, and Mr. Carpenter offered, in this connection, as follows:

The offer is to show that the President ordered Mr. Belknap as Secretary of War to send a regiment of infantry to Dakota; that Belknap ordered General Sherman to send a regiment of infantry to Dakota; that Sherman ordered General Sheridan to send a regiment of infantry to Dakota; that Sheridan ordered General Pope to send a regiment of infantry to Dakota, and Pope designated the Sixth Infantry, of which Colonel Hazen happened to be colonel. That is all the connection Belknap had with that transaction, and there is the proof of it. [Holding up a bundle of papers.] We offer these papers.

Mr. Manager McMahon said:

We object, and I will state the ground of our objection. We have given no evidence on this point. We concluded the examination of General Hazen without asking him when or where he was ordered after he had given the testimony before the House committee. We did so because we did not desire to encumber this record or this case with any other question except the one legitimately before the Senate. We did it because we were aware of General Hazen's own letter from which we might have drawn our own conclusions, but we care to draw none now and have made nothing upon it; and, as I repeat to the gentleman, he is endeavoring in this case to try a side issue, that side issue being in the first instance whether General Hazen had told the truth about a particular matter; and in the second instance (which has no connection with this case) whether General Belknap sent him to the frozen country because General Hazen testified before the Military Committee.

The question being submitted to the Senate, the evidence was excluded without division.

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[14] First session Fifty-fourth Congress, Senate Journal, p. 970; Record of trial, p. 234.

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2214. The Chief Justice held, in the Johnson trial, that a witness recalled to answer a question by a Senator might be reexamined by counsel for respondent.

The Chief Justice declined to rule finally that cross-examination of a witness in an impeachment trial should be concluded before his dismissal.

On April 13, 1868,[15] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was recalled as witness at the request of Mr. Reverdy Johnson, a Senator from Maryland, and was asked a certain question submitted in writing by Mr. Johnson, and admitted, after objection, by vote of the Senate.

The witness having answered the question, Mr. Henry Stanbery, of counsel for the respondent (in whose behalf General Sherman had been called originally as a witness), proposed another question.

Mr. Manager Benjamin F. Butler objected that, as counsel for respondent had dismissed the witness, he might not be examined again by counsel for respondent when brought back by a question of the court.

The Chief Justice[16] said:

The Chief Justice thinks it is entirely competent for the Senate to recall any witness. The Senate has decided that the question shall be put to the witness. That amounts to a recalling of him, and the Chief Justice is of opinion that the witness is bound to answer the questions. Does any Senator object?

A little later Mr. Stanbery proposed another question to the witness, and Mr. Manager Butler objected again to the renewal of the examination by the counsel for the President.

The Chief Justice said:

Nothing is more usual in courts of justice than to recall witnesses for further examination, especially at the instance of one of the members of the court. It is very often done at the instance of counsel. It is, however, a matter wholly within the discretion of the court, and if any Senator desires it the Chief Justice will be happy to put it to the court, whether the witness shall be further examined.

Argument arising, Mr. William M. Evarts, of counsel for the President, said:

The question, Senators, whether a witness may be recalled is a question of the practice of courts. It is a practice almost universal, unless there is a suspicion of bad faith, to permit it to be done, and it is always in the discretion of the court. In special circumstances, where collusion is suspected between the witness and counsel for wrong purposes adverse to the administration of justice, a strict rule may be laid down. Whatever rule this court in the future shall lay down as peremptory, if it be that neither party shall recall a witness that has been once dismissed from the stand, of course, will be obligatory upon us, but we are not aware that anything has occurred in the progress of this trail to intimate to counsel that any such rule had been adopted, or would be applied by this court.

Mr. Manager Butler said:

Mr. President, on Saturday this took place. This question was asked:

"In that interview"—

That is, when the offer was made—

"what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

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[15] Second session Fortieth Congress, Globe supplement, p. 169.

[16] Salmon P. Chase, of Ohio, Chief Justice.

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That question was offered to be put, and after argument, and upon a solemn ruling, twenty-eight gentlemen of the Senate decided that it could not be put. That was exactly the same question as this, asking for the same conversation at the same time. Then certain other proceedings were had, and after those were had the counsel waited some considerable time at the table in consultation, and then got up and asked leave to recall this witness this morning for the purpose of putting questions. The Senate gave that leave and adjourned. This morning they recalled the witness and put such questions as they pleased, and we spent as many hours, as you remember, in doing that. On Saturday they had got through with him, except that they wanted a little time to consider whether they would recall him; they did recall him this morning, and after getting through with him the witness was sent away. Then he was again recalled to enable one of the judges to put a question to satisfy his mind. Having put his question and satisfied his mind of something that he wanted satisfied, something that he wanted to know, how can it be that that opens the case to allow the President's counsel to go into a new examination of the witness? How do they know, if he is not acting as counsel for the President, and there is not some understanding between them, which I do not charge—how can the President's counsel know that his mind is not satisfied? He recalled the witness for the purpose of satisfying his own mind, and only for that reason. I agree it is common to recall witnesses for something that has been overlooked or forgotten, but I appeal to the Presiding Officer that while—and I never have said otherwise—a member of the court who wants to satisfy himself by putting some question may recall a witness for that purpose, it never is understood that that having been done the case was opened to the counsel on either side to go on and put other questions. The court is allowed to put the question, because it is supposed that the judge wants to satisfy his mind on a particular point. After the judge has satisfied his mind on that particular point then there is to be an end, and it is not to open the case anew. I trust I have answered the honorable Senator from Maryland that I meant no imputation. I was putting it right the other way.

After further argument, the Chief Justice said:

The Chief Justice will explain the position of the matter to the Senate. The Senator from Maryland desired that the following question should be put to the witness (General Sherman): "When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?" To that question the witness replied, "he did" or "yes." That answer having been given, the Senator from Maryland propounded the further question, "The witness having answered yes, will he state what he said his purpose was?" The witness having made an answer to that question, either partial or full, the Chief Justice is unable to decide which, the counsel for the President propose this question: "Have you answered as to both occasions?" That is the same question which the Senator from Kentucky now proposes to the Chief Justice, and which he is unable to answer. The Senator from Oregon [Mr. Williams] objects to the question proposed by the counsel for the President upon the ground that General Sherman, having been recalled at the instance of a Senator, and having been examined by him, he can not be examined by counsel for the President. The Chief Justice thinks that that is a matter entirely within the discretion of the Senate, but that it is usual, under such circumstances, to allow counsel to proceed with their inquiries relating to the same subject-matter.

The question was then put to the witness.

Later, as the witness had concluded, Mr. Manager Bingham stated that the managers might desire to recall him on the morrow.

Mr. William M. Evarts, of counsel for the President, then said:

We must insist, Mr. Chief Justice, that the cross-examination must be finished before the witness is allowed to leave the stand.

After brief discussion the Chief Justice said:

Undoubtedly the general rule is that if the managers desire to cross-examine they must cross-examine before dismissing the witness, but that will be a question for the Senate when General Sherman is recalled.

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2215. The Senate decided in the Belknap trial that a witness recalled, after direct and cross examination, to answer a question by a Senator might not be again subjected to direct examination.

On July 11, 1876,[17] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Then Mr. Manager John A. McMahon proposed a question.

To this Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

Both parties have made this case to the Senate as they have chosen to make it; and the court has gone through in its own way, seaching for facts, and, I understand, has rested also. Now, is it possible that the parties are to take this case up again and have any rights they would not have, arising from the examination as it took place on their part respectively? They can not go back with such a question certainly, unless it be on account of some questions that the court has put; and that certainly can not renew their right. They put this witness on the stand and exhausted him as far as they thought it was safe to do so; then we cross-examined him; both parties rested; and now the court has rested. Now we protest that the managers can not ask any more questions of this witness.

Mr. McMahon argued:

I understand even the order in which a witness is examined in a court of justice to be always a matter within the discretion of a court. A witness who has been fully discharged and gone may be called back and asked a question because something new has been developed in the case; and often—it is so laid down in the elementary books—you may recall a witness who has been absolutely discharged to ask him whether upon a certain occasion at a certain place he did not say so and so to A B, for the purpose of calling A B right there to contradict him. That is a very common practice.

Now, after the Senate has in the exercise of its discretion put further questions to this witness and eliminated a part of the truth from his bossom, what we want now is directly in the same line to put a question throwing light upon the very questions that have been put.

Mr. Montgomery Blair, of counsel for the respondent, replied:

I know what the gentleman says to be true that a witness may be recalled at any time at the discretion of the court; but the court presides over the trial and looks after the interests of justice, and therefore it is within the competency of the court, as every lawyer knows, to allow a witness to be recalled. But I appeal to this court and to its discretion and ask this court to consider whether it is just to allow this witness to be recalled and reexamined in the manner that it is now sought to do when the gentlemen have made their case, exhausted the witness, turned him over to us and we make a very brief cross-examination, and now when the manager seeks to have the last word of this witness and to reiterate and ding-dong in the ears of the Senate every time he makes a speech denunciations of our client as if he was appealing on the last argument of the case? I appeal to the Senate and to the justice of the Senate to know whether such a course of examination ought to be tolerated.

The point having been raised that the question had been already asked in practically the same form, Mr. McMahon withdrew it.

But soon thereafter, the witness in the meanwhile having answered questions put by Senators, Mr. Manager McMahon proposed another question.

Mr. Carpenter said:

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[17] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 240, 241, 243.

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That we object to. Unless the court mean to say that the whole case may now be opened by the managers, that is an improper question. It is their direct proof, and they have gone over that.

The Senate, without division, sustained the objection and excluded the question.

2216. In the Johnson trial the Senate declined to admit as rebutting evidence a document not responsive to any evidence offered on the other side.—On April 20, 1868,[18] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the defense had concluded their testimony, Mr. Manager Benjamin F. Butler proposed to put in evidence the nomination sent by the President to the Senate on the 13th of February, 1868, of Lieutenant-General Sherman to be general by brevet, and the nomination of Maj. Gen. George H. Thomas, sent to the Senate on the 21st of February, 1868, to be lieutenant-general by brevet and general by brevet.

Mr. William M. Evarts, of counsel for the respondent, objected:

It does not seem to us, Mr. Chief Justice and Senators, to be relevant, and it certainly is not rebutting. We have offered no evidence bearing upon the only evidence you offered under the eleventh article, which was the telegrams between Governor Parsons and the President on the subject of reconstruction. We have offered no evidence on that subject. * * * It is very apparent that this does not rebut any evidence we have offered. It is then offered as evidence in chief that the conferring of brevets on these two officers is in some way within the evil intents that are alleged in these articles. We submit that on that question there is nothing in this evidence that imports any such evil intent.

To this Mr. Manager Butler replied:

I only wish to say upon this that we do not understand that this case is to be tried upon the question of whether evidence is rebutting evidence or otherwise, because we understand that to-day the House of Representatives may bring in a new article of impeachment if they choose, and go on with it; but we have a right to put in any evidence which would be competent at any stage of the cause anywhere. * * * In many of the States—I can instance the State of New Hampshire—I am sure the rule of rebutting evidence does not obtain in their courts at all. Each party calls such pertinent and competent evidence as he has up to the hour when he says he has got through from time to time; and in some other of the States it is so applicable, and no injustice is done to anybody.

The Chief Justice having submitted the case to the Senate, there appeared in favor of receiving the evidence, yeas 14, nays 35. So the evidence was not received.

2217. The question as to whether or not testimony in an impeachment trial might be taken by a committee of the Senate.—On March 25, 1904,[19] in the Senate, Mr. George F. Hoar, of Massachusetts, submitted the following resolution, which was considered by unanimous consent and agreed to:

Resolved, That the Committee on Rules be directed to consider and report whether any amendment be desirable in the Senate rules relating to impeachments, and especially whether the rules may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate.

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[18] Second session Fortieth Congress, Senate Journal, p. 915; Globe Supplement, p. 247.
[19] Second session Fifty-eighth Congress, Record, p. 3660.

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Rules of Evidence in an Impeachment Trial*

1. Strict rules of the courts followed. Sections 2218, 2219.[1]
2. Must be relevant to the pleadings. Sections 2220–2225.
3. Best evidence required. Sections 2226–2229.
4. Hearsay testimony. Section 2230–2237.
5. Testimony as to declarations of respondent. Sections 2238–2245.
6. As to acts of the respondent after the fact. Sections 2246–2247.
7. As to opinions of witnesses. Sections 2248–2257.
8. Public documents as evidence. Sections 2258–2274.
9. General decisions as to evidence. Sections 2275–2298.

2218. After discussion of English precedents, the Senate ruled decisively in the Peck trial that the strict rules of evidence in force in the courts should be applied.

Witnesses in an impeachment trial are required to state facts and not opinions.

Decision as to the limits within which expert testimony may be admitted in an impeachment trial.

On January 7, 1831,[2] in the high court of impeachment during the trial of the case of The United States *v.* James H. Peck, a witness, Robert Walsh, was examined on behalf of the respondent, and Mr. William Wirt, counsel for the respondent, asked this question:

> When you read the strictures signed "A Citizen," did they strike you as misrepresenting the opinion of the court in a manner calculated to awaken the contempt and indignation of the people of Missouri, and to impair the confidence of the suitors in that court in the intelligence and integrity of the tribunal?

Judge Peck was impeached for punishing for contempt the author of a letter signed "A Citizen" and published in a St. Louis paper, criticising an opinion delivered by Judge Peck in the case of Goulard's heirs.

Mr. Henry R. Storrs, of New York, one of the managers for the House of Representatives, objected to this question, on the ground that the witness was asked for an opinion instead of a fact. The question for the court to settle in this trial was this: Did the strictures misrepresent the opinion? That was a question which must be decided on facts. The witness was now asked his conclusion, but was that an evidence of fact?

Mr. Jonathan Meredith, counsel for the respondent, argued that the question at issue involved a knowledge of the obscure and intricate

* Hinds' Precedents, vol. 3, p. 537 (1907).

[1] Under parliamentary law the Lords are governed by the legal rules of evidence. Section 2155 of this volume. Legal rules of evidence insisted on in trial of Humphreys. Section 2395. As to necessity of proof of intent to secure judgment for that fact. Sections 2381, 2382.

[2] Second session Twenty-first Congress. Senate Impeachment Journal, p. 331; Report of the trial of James H. Peck, pp. 229–239.

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subject of Spanish titles and the application of Spanish laws in Louisiana Territory. The witness, from his familiarity with those subjects, was able to assist the court in forming its opinion. The managers had denied that professional knowledge was needed to show whether or not one paper misrepresented another; but Mr. Meredith held that in this case the court of impeachment could not be presumed to possess the requisite knowledge to enable it to form a correct judgment, unassisted by the opinions and conclusions of others. Therefore the proposed testimony was competent. Furthermore, the intention of the respondent in punishing the author of the strictures was a question of importance, and the proposed testimony would be pertinent to that branch of the discussion.

Mr. William Wirt, also counsel for respondent, elaborated the points outlined by his associate, but before doing so made remarks on the law of evidence as applied to impeachments:

In the well-known case of Warren Hastings, which occupied England so long, a most able and masterly protest was entered by Mr. Burke and the managers on the part of the House of Commons against the application of the rigid rules of evidence which governed the practice of the courts of law. It was contended before that tribunal that instead of the strict and iron rules of a law court, the field was broad and liberal, and to be controlled by no rule but the Lex et consuetudo Parliamenti. The protest is extended, very learned, and rests on numerous authorities; and if this court could have an opportunity to review it, they would not feel the least hesitation as to the fact that they are not to be trammeled and hemmed in by the rigid rules of evidence. I find that in the remarks of the Federalist respecting the high court of impeachment erected by the Constitution of this country, the writer lays it down as a conceded point that the strictness which prevails in the ordinary criminal courts does not apply here, nor is it required that the article of impeachment should be drawn up with all the rigid precision of an indictment. The proceedings in this highest court are to be more liberal and free, and nearer substantially to the course pursued by courts conversant with the civil than the criminal law. Mr. Rawle has the same idea. And the question would be, if the original view could now be before this court, whether this tribunal, which is not an appellate court on all questions of law, and is not, therefore, conversant with the strict rules of law, but whose whole jurisdiction has respect to impeachments alone, should or should not open itself to all lights which can be brought to bear on this decision, and whether more injustice would not accrue from narrowing the apertures through which light is to be received, than from opening them in all directions from whence a single ray can touch them.

In reply, Mr. James Buchanan, of Pennsylvania, chairman of the managers, argued at length in support of the objection, saying in the course of his remarks:

This question in four lines embraces the very essence of the respondent's defense—the very question to be decided by the court, and asks the witness to substitute his opinion for the judgment of the tribunal. I ask, Is there a court in the United States, however inferior its grade, which, on the trial of an indictment for a libel, would not, without an argument, overrule the opinion of a witness as to whether the matter charged to be libellous was or was not a libel, and what would be its effect on the public mind? Does it not strike everyone at the first blush that no such court could be found in any portion of this country?

The gentleman who last addressed the court has argued the question with very great ingenuity, and has presented a variety of topics introductory to the new doctrine which he has advanced concerning the law of evidence. He at first contended (though he afterwards waived the point) that the rules of evidence, by which all other courts of the United States are bound, ought not to be applied in their strictness to this high court of impeachment; and to sustain this proposition, he cited the celebrated protest of Mr. Burke upon the trial of Warren Hastings. But the gentleman seems to have forgotten that in that far-famed trial this very question was fairly made and decided; and it was held that the House of Lords, when sitting as a high court of impeachment, was bound by the same

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rules of evidence which regulated the proceedings of the most inferior courts of the kingdom. The whole trial of Judge Chase proceeded upon the same principle.

But even without such a precedent, could there be a reasonable doubt upon this question? What, sir? Against whom is it that this tremendous power of impeachment is invoked? Is it not against high state criminals? Men of standing and influence and character? And when the House of Representatives bring a culprit of this description to trial, are they to be told that in crimes affecting the whole nation, and which, in their consequences, may bring ruin upon the people, that the accused shall enjoy rights and privileges and immunities which are denied to any ordinary citizen, when arraigned before the most inferior court in the land? We deny the existence of any power, even in this high court, to dispense with the rules of evidence. When the House of Representatives become accusers, it is their right to have these rules administered here as they are administered by the Supreme Court and the other tribunals of the country.

There is another point of view in which the doctrine for which we contend will appear peculiarly proper and necessary. Will not the proceedings upon this trial be regarded as a precedent? And if this court shall decide questions of evidence against the law of the land will not such decisions bring the law of evidence into doubt and confusion throughout the United States?

The gentleman has also invoked the Federalist to his aid; and what does it say? Does it declare that on the trial of impeachments there is to be a departure from the established rules of proceeding, and that testimony is to be admitted here which ought to be rejected in a court of law? By no means. It merely recognizes the principle of the English law, that "in the delineation of the offense" in the form of the article of impeachment the same rigid exactness is not required which is necessary in framing an indictment. There is not the least intimation that this court, in the progress of the trial, ought to depart from the ordinary rules of evidence.

In further argument Mr. Storrs said:

I confess I feel alarmed to hear it gravely urged here that an impeachment is to be governed by other rules than the well-known and long-established rules of evidence. Rules of evidence are as much a part of the law of the land as any other part of it, and they constitute the security of every man. A more dangerous principle could not be broached, or a more alarming principle established than that, in the trial of an impeachment, the ordinary rules of evidence are to be relaxed; and I was, I confess, surprised that the respondent should seek to unsettle a principle the overturning of which might easily lead to the most unjust and oppressive proceedings. If this is to be done in favor of the respondent, will it be done in favor of him alone, or may not State favorites be shielded or State victims be destroyed by the same process?

On the question, "Shall this interrogatory be put to the witness?" there appeared yeas 7, nays 35.

Again, on January 10,[3] the same witness being under examination, Mr. Merredith asked this question, which on objection was excluded by a vote of yeas 1, nays 39:

Do you think that the publication signed "A Citizen" was calculated to incense the claimants against the court, and to impair, in their minds, their confidence and respect for the court?

2219. In the Johnson trial the Senate declined to agree to a declaration modifying the strictness of the ordinary rules of evidence.—On April 16, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Charles Sumner, of Massachusetts, proposed the following as a declaration of opinion to be adopted as an answer to the constantly recurring questions on the admissibility of testimony:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court;

[3] Journal, p. 332; Report of trial, p. 239.
[4] Second session Fortieth Congress, Senate Journal, p. 902; Globe supplement, p. 195.

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Considering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal;

Considering that the reasons for the exclusion of evidence on an ordinary trial where the judge responds to the law and the jury to the fact are not applicable to such a proceeding;

Considering that, according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality;

And considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence;

Therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side not trivial or obviously irrelevant in nature shall be received without objection, it being understood that the same when admitted shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighted by Senators in the final judgment.

Mr. John Conness, of California, moved that the paper lie on the table, and the question being taken, there appeared yeas 33, nays 11. So the paper was laid on the table.

2220. In an impeachment trial testimony that can be construed as fairly within the purport of the articles is admitted.—On April 2, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Charles A. Tinker was called and sworn as a witness on behalf of the managers, to prove the following dispatches:

MONTGOMERY, ALA.,
January 17, 1867.

Legislature in session. Efforts making to reconsider vote on constitutional amendment. Report from Washington says it is probable an enabling act will pass. We do not know what to believe. I find nothing here.

LEWIS E. PARSONS,
Exchange Hotel.

His Excellency ANDREW JOHNSON, *President.*

UNITED STATES MILITARY TELEGRAPH,
EXECUTIVE OFFICE, WASHINGTON, D.C.,
January 17, 1867.

What possible good can be obtained by reconsidering the constitutional amendment? I know of none in the present posture of affairs; and I do not believe the people of the whole country will sustain any set of individuals in attempts to change the whole character of our Government by enabling acts or otherwise. I believe, on the contrary, that they will eventually uphold all who have patriotism and courage to stand by the Constitution and who place their confidence in the people. There should be no faltering on the part of those who are honest in their determination to sustain the several coordinate departments of the Government in accordance with its original design.

ANDREW JOHNSON.

Hon. LEWIS E. PARSONS, *Montgomery, Ala.*

Mr. Butler stated that he introduced this evidence under the tenth and eleventh articles of impeachment to show how President Johnson had endeavored to oppose the reconstruction legislation of Congress, of which the defeated amendment referred to in the dispatches was a part. Lewis E. Parsons was provisional governor of Alabama, and a man of influence.

The counsel for the President objected to the evidence because it did not refer to acts charged in the articles of impeachment. The tenth article referred to the President's speeches, and not to telegrams; and the eleventh charged him with trying to remove Secretary of War

[5] Second session Fortieth Congress, Senate Journal, p. 877; Globe supplement, pp. 90–92.

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Stanton and with trying to prevent the execution of the reconstruction laws. Mr. William M. Evarts, of counsel for the President, said:

"Designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted."

That is the entire purview of the intent. Now, the only acts charged as done with this intent are the delivery of a speech at the Executive Mansion in August, 1866, and two speeches, one at St. Louis and the other at Cleveland, in September, 1866. The article concludes that by means of these utterances—

"Said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit and was then and there guilty of a high misdemeanor in office."

That is the gravamen of the crime; that he brought the presidential office into scandal by these speeches made with this intent. Senators will judge from the reading of this telegram, dated in January, 1867, whether that supports the principal charge or intent of his derogating from the credit of Congress or bringing the presidential office into discredit.

The eleventh article has for its substantive charge nothing but the making of speech of the 18th of August, 1866, saying that by that speech he declared and affirmed—

"In substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and, also, thereby denying, and intending to deny, the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration"—

That is, in pursuance of the speech made at the Executive Mansion on the 18th of August, 1866—

"The said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, A. D. 1868, at the city of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled, 'An act regulating the tenure of certain civil offices,' passed March 2, 1867"—

Which was after the date of this dispatch—

"By unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War."

The court will consider whether this dispatch touches that subject.

"And also by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an act entitled, 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March 2, 1867; and also to prevent the execution of an act entitled, 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867."

Also, after the date of this dispatch. It is under one or the other of these two articles that this dispatch is, in its date and in its substance, supposed to be relevant.

Mr. Evarts concluded by contending that there was nothing in the telegram that showed the President guilty of crime or misdemeanor in opposing legislation of Congress or in doing anything mentioned in the articles.

Mr. Manager George S. Boutwell specifically cited the concluding words of the eleventh article, wherein the President was charged with "attempting to devise and contrive, means then and there * * * to

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prevent the execution of an act" known as the reconstruction act. The adoption of the constitutional amendment was part of the reconstruction system, and the telegram to Governor Parsons was an act hostile to reconstruction.

The question being taken, the Senate decided, yeas 27, nays 17, that the evidence should be admitted.

2221. In the Johnson trial the Senate held inadmissible as evidence of an intent specified in the articles an act not specified in the articles.—On April 2, 1868,[6] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William E. Chandler, formerly Assistant Secretary of the Treasury, was called by the managers and sworn. The question "Do you know Edmund Cooper?", asked by Mr. Manager Benjamin F. Butler, caused Mr. Henry Stanbery, of counsel for the President, to ask what was the object of eliciting testimony concerning Mr. Cooper. After discussion, Mr. Butler offered the following in writing:

We offer to prove that after the President had determined on the removal of Mr. Stanton, Secretary of War, in spite of the action of the Senate, there being no vacancy in the office of Assistant Secretary of the Treasury, the President unlawfully appointed his friend and theretofore private secretary, Edmund Cooper, to that position as one of the means by which he intended to defeat the tenure-of-civil-office act and other laws of Congress.

Mr. Manager Butler further stated that the proof was offered under the eighth and eleventh articles of impeachment.

Objecting to the testimony offered, Mr. William M. Evarts, of counsel for the President, quoted the eighth article's charge against the President:

"With intent unlawfully to control the disbursement of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, did unlawfully and contrary to the provisions of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1868, and in violation of the Constitution of the United States, there being no vacancy in the office of Secretary for the Department of War, and with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows; that is to say:"

Having quoted the article, Mr. Evarts continued:

Now, you propose to prove under that, that there being no vacancy in the office of Assistant Secretary of the Treasury, he proposed to appoint his private secretary, Edmund Cooper, Assistant Secretary of the Treasury. That is the idea, is it, under the eighth article? We object to this as not admissible under the eighth article. As by reference it will be perceived it charges nothing but an intent to violate the civil-tenure act, and no mode of violating that except, in the want of a vacancy in the War Department, the appointment of General Thomas contrary to that act.

As for the eleventh article, the honorable court will remember that in our answer we stated that there was in that article no such description, designation of ways or means, or attempt at ways and means, whereby we could answer definitely; and the only allegations there are, that in pursuance of a speech that the President made on the 18th of August, 1866, he—

"Afterwards, to wit, on the 21st day of February, A.D., 1868, at the city of Washington, in the District of Columbia, did unlawfully, and in disregard of the requirement of the Constitution that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled 'An act regulating the tenure of certain civil offices,' passed March 2, 1867, by unlawfully devising and contriving and attempting to devise and contrive means by which

[6] Second session Fortieth Congress, Senate Journal, pp. 875, 876; Globe Supplement, pp. 86–89.

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he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and also by further unlawfully devising and contriving and attempting to devise and contrive means, then and there, to prevent the execution of an act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes,' approved March 2, 1867; and also to prevent the execution of an act entitled 'An act to provide for the more efficient government of the rebel States,' passed March 2, 1867, whereby," etc.

The only allegation here as to time and principal action, in reference to which all these unnamed and undescribed ways and means were used, is that on the 21st of February, 1868, at the city of Washington, he did unlawfully and in disregard of the Constitution attempt to prevent the execution of the civil tenure-of-office act by unlawfully devising and contriving and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from resuming his place in the War Department. And now proof is offered here, substantively, of efforts in November, 1867, to appoint, in the want of a vacancy in the office of Assistant Secretary of the Treasury, Mr. Edmund Cooper. We object to that evidence.

Mr. Butler urged that the appointment of Cooper was one of the means whereby the President sought to so arrange in the Treasury Department that General Thomas's requisitions from the War Department should be honored.

Mr. John A. Bingham, of the managers, also urged that the appointment of Cooper was intended as a means of illegally drawing money from the Treasury on requisitions of an illegal acting Secretary of War. Mr. Bingham further said on the question of evidence:

We consider the law to be well settled and accepted everywhere in this country and England to-day that where an intent is the subject-matter of injury in a criminal prosecution, other and independent acts on the part of the accused, looking to the same result, are admissible in evidence for the purpose of establishing that fact. And we go further than that. We undertake to say, upon very high and commanding authority, not to be challenged here or elsewhere, that it is settled that such other and independent acts showing the purpose to bring about the same general result, although at the time of the inquiry the subject-matter of a separate indictment, are nevertheless admissible. I doubt not that it will occur to the recollection of honorable Senators that among other cases illustrative of the rule which I have just cited it has been stated in the books—the cases have been ruled first and then incorporated into books of standard authorities—that where a party, for example, was charged with shooting with intent to kill a person named, it was competent, in order to show the malice, the malicious intent of the act, to show that at another time and place he laid poison. A party is charged with passing a counterfeit note; it is competent, in order to prove the scienter, to show that he was in possession of other counterfeit notes of a different denomination; and the rule, as stated in the books, is that what is competent to prove the scienter, as a general principle, is competent to prove the intent.

Before deciding the question several Senators propounded questions tending to show whether or not an Assistant Secretary of the Treasury could, in defiance of his chief, the Secretary of the Treasury, or without a special designation from him, or after his removal, honor requisitions for money from the Treasury. The response of witnesses and the reading of the law did not make plain that the Assistant Secretary would have the power, and rather suggested that he would not have it.

The question being taken as to the admissibility of the evidence, the yeas were 22, the nays 27. So the evidence was not admitted.

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2222. In the Johnson trial the Senate declined to admit evidence of a fact bearing on the question of intent, no issue having been accepted in the pleadings on this point.

The Senate refused, in the Johnson trial, to admit as evidence in mitigation testimony held otherwise inadmissible.

Instances in the Johnson trial wherein the decisions of the Chief Justice on questions of evidence were overruled.

Instances wherein Senators propounded questions to counsel during arguments as to admissibility of evidence.

On April 17, 1968,[7] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness on behalf of the respondent. Mr. Welles testified that he was present at a Cabinet meeting on Friday, February 26, 1867, and thereupon Mr. Willian M. Evarts, of counsel for the respondent, submitted the following offer of proof:

We offer to prove that the President, at a meeting of the Cabinet while the bill was before the President for his approval, laid before the Cabinet the tenure-of-civil-office bill for their consideration and advice to the President respecting his approval of the bill; and thereupon the members of the Cabinet then present gave their advice to the President that the bill was unconstitutional and should be returned to Congress with his objections, and that the duty of preparing a message, setting forth the objection to the constitutionality of the bill, was devolved on Mr. Seward and Mr. Stanton; to be followed by proof as to what was done by the President and Cabinet up to the time of sending in the message.

Mr. Manager Benjamin F. Butler at once objected to the admission of the proposed testimony.

The arguments on this question of evidence were made principally on April 18.

Mr. Manager James F. Wilson, in arguing against the admissibility of the testimony, pointed out that the House of Representatives had, in their replication, made no issue on the question whether or not the President had been advised by his Cabinet that the tenure-of-office act was unconstitutional. Whether the President was so advised or not they held to be immaterial to this case, and hence objected to the testimony on that point as irrelevant.

Mr. Manager Wilson continued:

The respondent is arraigned for a violation of and a refusal to execute the law. He offers to prove that his Cabinet advised him that a certain bill presented for his approval was in violation of the Constitution; that he accepted their advice and vetoed the bill; and upon that, and such additional advice as they may have given him, claims the right to resist and defy the provisions of the bill, notwithstanding its enactment into a law by two-thirds of both Houses over his objections. In other words, he claims, substantially, that he may determine for himself what laws he will obey and execute, and what laws he will disregard and refuse to enforce. In support of this claim he offers the testimony which, for the time being, is excluded by the objection now under discussion. If I am correct in this, then I was not mistaken when I asserted that this objection confronts one of the most important questions involved in this case. It may be said that this testimony is offered merely to disprove the intent alleged and charged in the articles; but it goes beyond this and reaches the main question, as will clearly appear to the mind of anyone who will read with care the answer to the first article. The testimony is improper for any purpose and in every view of the case.

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[7] Second session Fortieth Congress, Senate Journal, pp. 909–911; Globe supplement, pp. 225–231.

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Mr. Manager Wilson next preceded to examine the constitutional provisions relating to the executive power, and the punishment of impeachment, and then said:

The executive power was created to enforce the will of the nation; the will of the nation appears in its laws; the two Houses of Congress are intrusted with the power to enact laws, the objections of the Executive to the contrary notwithstanding; laws thus enacted, as well as those which receive the executive sanction, are the voice of the people. If the person clothed for the time being with the executive power—the only power which can give effect to the people's will—refuses or neglects to enforce the legislative decrees of the nation, or willfully violates the same, what constituent elements of governmental power could be more properly charged with the right to present and the means to try and remove the contumacious Executive than those intrusted with the power to enact the laws of the people, guided by the checks and balances to which I have directed the attention of the Senate? What other constituent parts of the Government could so well understand and adjudge of a perverse and criminal refusal to obey, or a willful declination to execute, the national will, than those joining in its expression? There can be but one answer to these questions. The provisions of the Constitution are wise and just beyond the power of disputation in leaving the entire subject of the responsibility of the Executive to faithfully execute his office and enforce the laws to the charge, trial, and judgment of the two several branches of the legislative department, regardless of the opinions of Cabinet officers or of the decisions of the judicial department. The respondent has placed himself within this power of impeachment by trampling on the constitutional duty of the Executive and violating the penal laws of the land.

After contrasting the constitutions of the United States and England, the manager quoted an opinion given by Attorney-General Black, dated November 20, 1860, wherein it was stated that "to the Chief Executive Magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed," and proceeded:

A departure from this view of the character of the executive power, and from the nature of the duty and obligation resting upon the officer charged therewith, would surround this nation with perils of the most fearful proportions. Such a departure would not only justify the respondent in his refusal to obey and execute the law, but also approve his usurpation of the judicial power when he resolved that he would not observe the legislative will, because in his judgment, it did not conform to the provisions of the Constitution of the United States touching the subjects embraced in the articles of impeachment on which he is now being tried at your bar. Concede this to him, and when and where may we look for the end? To what result shall we arrive? Will it not naturally and inevitably lead to a consolidation of the several powers of the Government in the executive department? And would this be the end? Would it not rather be but the beginning? If the President may defy and usurp the powers of the legislative and judicial departments of the Government, as his caprices or the advice of his cabinet may incline him, why may not his subordinates, each for himself, and touching his own sphere of action, determine how far the directions of his superior accord with the Constitution of the United States, and reject and refuse to obey all that come short of the standard erected by his judgment?

In conclusion, Mr. Manager Wilson said:

Concede to the President immunity through the advice of his Cabinet officers and you reverse, by your decision, the theory of our Constitution.

Mr. Benjamin R. Curtis, of counsel for the respondent, in arguing said that he should not consume time to reply to those matters which seemed to touch the merits of the case. This was simply a question as to the admissibility of proofs. Continuing, Mr. Curtis said:

The honorable manager has read a portion of the answer of the President, and has stated that the House of Representatives has taken no issue upon that part of the answer. As to that, and as to the effect of that admission by the honorable manager, I shall have a word or two to say presently. But the honor-

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able manager has told you that the House of Representatives, when the honorable manager brought to your bar these articles, did not intend to assert and prove the allegations in them which are matters of fact. One of these allegations, Mr. Chief Justice, as you will find by reference to the first article and to the second article and to the third article, is that the President of the United States in removing Mr. Stanton and in appointing General Thomas intentionally violated the Constitution of the United States; that he did these acts with the intention of violating the Constitution of the United States. Instead of saying, "it is wholly immaterial what intention the President had; it is wholly immaterial whether he honestly believed that this act of Congress was unconstitutional; it is wholly immaterial whether he believed that he was acting in accordance with his oath of office, to preserve, protect, and defend the Constitution when he did this act"—instead of averring that, they aver that he acted with an intention to violate the Constitution of the United States.

Now, when we introduce evidence here, or offer to introduce evidence here, bearing on this intent, evidence that before forming any opinion upon this subject he resorted to proper advice to enable him to form a correct one, and that when he did form and fix opinions on this subject it was under the influence of this proper advice, and that consequently when he did this act, whether it was lawful or unlawful, it was not done with the intention to violate the Constitution—when we offer evidence of that character, the honorable manager gets up here and argues an hour by the clock that it is wholly immaterial what his intention was, what his opinion was, what advice he had received and in conformity with which he acted in this matter.

* * * * * * *

I therefore say when the question of his intention comes to be considered by the Senate, when the question arises in their minds whether the President honestly believed that this was an unconstitutional law, when the particular emergency arose, when if he carried out or obeyed that law he must quit one of the powers which he believed were conferred upon him by the Constitution, and not be able to carry on one of the departments of the Government in the manner the public interests required—when that question arises for the consideration of the Senate, then they ought to have before them the fact that he acted by the advice of the usual and proper advisers; that he resorted to the best means within his reach to form a safe opinion upon this subject, and that, therefore, it is a fair conclusion that when he did form that opinion it was an honest and fixed opinion which he felt he must carry out in practice if the proper occasion should arise. It is in this point of view, and this point of view only, that we offer this evidence.

In the course of the discussion Mr. Jacob M. Howard, a Senator from Michigan, had proposed this inquiry:

Do the counsel for the accused not consider that the validity of the tenure of office bill was purely a question of law, to be determined on this trial by the Senate: and, if so, do they claim that the opinion of Cabinet officers touching that question is competent evidence by which the judgment of the Senate ought to be influenced?

To this Mr. Curtis answered:

The constitutional validity of any bill is, of course, a question of law which depends upon a comparison of the provisions of the bill with the law enacted by the people for the government of their agents. It depends upon whether those agents have transcended the authority which the people gave them, and that comparison of the Constitution with the law is, in the sense that was intended undoubtedly by the honorable Senator, a question of law.

The next branch of the question is "whether that question is to be determined on this trial by the Senate."

That is a question I can not answer. That is a question that can be determined only by the Senate themselves. If the Senate should find that Mr. Stanton's case was not within this law, then no such question arises, then there is no question in this particular case of a conflict between the law and the Constitution. If the Senate should find that these articles have so charged the President that it is necessary for the Senate to believe that there was some act of turpitude on his part connected with this matter, some mala fides, some bad intent, and that he did honestly believe, as he states in his answer, that this was an unconstitutional law, that an occasion had arisen when he must act accordingly under his oath of

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office, then it is immaterial whether this was a constitutional or unconstitutional law; be it the one or be it the other, be it true or false that the President has committed a legal offense by an infraction of the law, he has not committed the impeachable offense with which he is charged by the House of Representatives. And, therefore, we must advance beyond these two questions before we reach the third branch of the question which the honorable Senator from Michigan propounds, whether the question of the constitutionality of this law must be determined on this trial by the Senate. In the view of the President's counsel there is no necessity for the Senate to determine that question. The residue of the inquiry is:

"Do the counsel claim that the opinion of the Cabinet officers touching that question"—

That is, the constitutionality of the law—

"is competent evidence by which the judgment of the Senate might be influenced?"

Certainly not. We do not put them on the stand as experts on questions of constitutional law. The judges will determine that out of their own breasts. We put them on the stand as advisers of the President to state what advice, in point of fact, they gave him, with a view to show that he was guilty of no improper intent to violate the Constitution.

Mr. Curtis next read a question propounded by Mr. Reverdy Johnson, a Senator from Maryland:

"Do the counsel for the President understand that the managers deny the statement made by the President in his message of December 12, 1867, to the Senate, as given in evidence by the managers at page 45 of the official report of the trial that the members of the Cabinet gave him"—

That is, the President—

"the opinion there stated as to the tenure of office act; and is the evidence offered to corroborate that statement, or for what other object is it offered?"

To this Mr. Curtis replied:

We now understand, from what the honorable manager has said this morning, that the House of Representatives has taken no issue on that part of our answer; that the honorable managers do not understand that they have traversed or denied that part of our answer. We did also understand before this question was proposed to us that the honorable managers had themselves put in evidence the message of the President of the 12th of December, 1867, to the Senate, in which he states that he was advised by the members of the Cabinet unanimously, including Mr. Stanton, that this law would be unconstitutional if enacted. They have put that in evidence themselves.

Nevertheless, Senators, this is an affair, as you perceive, of the utmost gravity in any possible aspect of it; and we did not feel at liberty to avoid or abstain from the offering of the members of the President's Cabinet that they might state to you, under the sanction of their oaths, what advice was given. I suppose all that the managers would be prepared to admit might be—certainly they have made no broader admission—that the President said these things in a message to the Senate; but from the experience we have had thus far in this trial we thought it not impossible that the managers, or some one of them speaking in behalf of himself and the others, might say that the President had told a falsehood, and we wish, therefore, to place ourselves right before the Senate on this subject. We desire to examine these gentlemen to show what passed on this subject, and we wish to do it for the purposes I have stated.

Mr. George H. Williams, a Senator from Oregon, proposed this question:

Is the advice given to the President by his Cabinet with a view of preparing a veto message pertinent to prove the right of the President to disregard the law after it was passed over his veto?

To this Mr. Curtis replied:

It is not of itself sufficient; it is not enough that the President received such advice: he must show that an occasion arose for him to act upon it which in the judgment of the Senate was such an occasion that you could not impute to him wrong intention in acting. But the first step is to show that he honestly believed that this was an unconstitutional law. Whether he should treat it as such in a particular instance is a matter depending upon his own personal responsibility

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without advice. That is the answer which I suppose is consistent with the views we have of this case.

The arguments being closed, the Chief Justice [8] said:

Senators, the question now before the Senate, as the Chief Justice conceives, respects not the weight but the admissibility of the evidence offered. To determine that question it is necessary to see what is charged in the articles of impeachment. The first article charges that on the 21st day of February, 1868, the President issued an order for the removal of Mr. Stanton from the office of Secretary of War; that this order was made unlawfully, and that it was made with intent to violate the tenure of office act and in violation of the Constitution of the United States. The same charge in substance is repeated in the articles which relate to the appointment of Mr. Thomas, which was necessarily connected with the transaction. The intent, then, is the subject to which much of the evidence on both sides has been directed; and the Chief Justice conceives that this testimony is admissible for the purpose of showing the intent with which the President has acted in this transaction. He will submit the question to the Senate if any Senator desires it.

The question being taken, there appeared yeas 20, nays 29. So the evidence was decided to be inadmissible.

Immediately thereafter [9] a question asked of the same witness by Mr. Evarts was challenged, thereby bringing from the counsel for the respondent this offer:

We offer to prove that at the meetings of the Cabinet at which Mr. Stanton was present, held while the tenure of office bill was before the President for approval, the advice of the Cabinet in regard to the same was asked by the President and given by the Cabinet; and thereupon the question whether Mr. Stanton and the other Secretaries who had received their appointment from Mr. Lincoln were within the restrictions upon the President's power of removal from office created by said act was considered, and the opinion expressed that the Secretaries appointed by Mr. Lincoln were not within such restrictions.

Mr. Manager Butler objected that this question related to the construction of a law, while the other related to its constitutionality; and that both questions fell under the same principle.

After argument, the Chief Justice said:

The Chief Justice is of opinion that this testimony is proper to be taken into consideration by the Senate sitting as a court of impeachment; but he is unable to determine what extent the Senate is disposed to give to its previous ruling, or how far they consider that ruling applicable to the present question.

The question being submitted to the Senate, it was decided, yeas 22, nays 26, that the evidence was inadmissible.

Very soon thereafter [10] another question asked of the same witness was objected to, whereat the counsel for the respondent presented this offer:

We offer to prove that at the Cabinet meetings between the passage of the tenure of civil office bill and the order of the 21st of February, 1868, for the removal of Mr. Stanton upon occasions when the condition of the public service was affected by the operation of that bill came up for the consideration and advice of the Cabinet, it was considered by the President and Cabinet that a proper regard to the public service made it desirable that upon some proper case a judicial determination on the constitutionality of the law should be obtained.

To this Mr. Manager Butler objected:

Mr. President and Senators, we, of the managers, object, and we should like to have this question determined in the minds of the Senators upon this principle. We understand here that the determination of the Senate is, that Cabinet discussions, of whatever nature, shall not be put in as a shield to the President.

[8] Salmon P. Chase, of Ohio, Chief Justice.
[9] Senate Journal, pp. 911, 912; Globe supplement, pp. 230, 231.
[10] Senate Journal, p. 912; Globe supplement, p. 233.

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That I understand, for one, to be the broad principle upon which this class of questions stand and upon which the Senate has voted; and, therefore, these attempts to get around it, to get in by detail and at retail—if I may use that expression—evidence which in its wholesale character can not be admitted, are simply tiring out and wearing out the patience of the Senate. I should like to have it settled, once for all, if it can be, whether the Cabinet consultations upon any subject are to be a shield.

In reply, Mr. Evarts argued:

By decisive determinations upon certain questions of evidence arising in this cause you have decided that, at least, what in point of time is so near to this action of the President as may fairly import to show that in his action he was governed by a desire to raise a question for judicial determination shall be admitted. About that there can be no question that the record will confirm my statement. Now, my present inquiry is to show that within this period, thus extensively and comprehensively named for the present, in his official duty and in his consultations concerning his official duty with the heads of Departments, it became apparent that the operation of this law raised embarrassments in the public service and rendered it important as a practical matter that there should be a determination concerning the constitutionality of the law, and that it was desirable that upon a proper case such a determination should be had.

Mr. John B. Henderson, a Senator from Missouri, proposed this question to the managers:

If the President shall be convicted, he must be removed from office.

If his guilt should be so great as to demand such punishment, he may be disqualified to hold and enjoy any office under the United States.

Is not the evidence now offered competent to go before the court in mitigation?

To this Mr. Manager Butler replied that usually evidence in mitigation should be submitted after verdict and before judgment. Therefore, he said:

There is an appreciable time in this tribunal, as in all others, between a verdict of guilty and the act of judgment; and if any such evidence can be given at all, it must, in my judgment, be given at that time. It certainly can not be given for any other purpose.

The Chief Justice having submitted the question of admissibility to the Senate there appeared yeas 19, nays 30. So the evidence was not admitted.

Immediately thereupon [11] Mr. Evarts asked of the same witness this question:

Was there, within the period embraced in the inquiry in the last question, and at any discussions or deliberations of the Cabinet concerning the operation of the tenure of civil office act and the requirements of the public service in regard to the same, any suggestion or intimation whatever touching or looking to the vacation of any office by force or getting possession of the same by force?

To this Mr. Manager Butler objected as wholly immaterial and excluded under the principles of the last ruling. He said, in response to a question by the Chief Justice, that it was not worth while to object to the question as leading.

The Chief Justice having submitted the question of admissibility to the Senate, there appeared yeas 18, nays 26. So the question was excluded.

2223. Evidence that from the nature of the charge was immaterial was ruled out during the Swayne trial, although respondent's answer had seemed to lay a foundation for it.—On February 14, 1905,[12] in the Senate sitting for the trial of Judge Charles

[11] Senate Journal, p. 913; Globe supplement, p. 234.
[12] Third session Fifty-eighth Congress, Record, pp. 2532, 2533.

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Swayne, a witness, Elza T. Davis, was under examination, when Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, I want to direct the attention of the Presiding Officer to a matter in the way of an inquiry for information. I understand that the pleadings of this case do make an issuable fact possibly of the question of inconvenience; but what I wish to ask the Chair is this: When the law itself provides that it shall be unlawful for a judge to reside outside of his district, with no question whatever of convenience or inconvenience, whether the time of the Senate could properly be taken up upon an issue which, to my mind, is in no wise involved in the case. I call the Chair's attention to the law, which is very specific.

"Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

If the question, it seems to me, Mr. President, of convenience or inconvenience is a question at all, it is precluded by the state itself, which presumes that it will be convenient, or more convenient, if the judge resides there, or less convenient if he does not.

I do not know how many witnesses the managers on the part of the House may have on this subject, but it seems to me that the Chair, sitting as a judge, would necessarily have to rule that all this matter was wholly immaterial. The simple question is, Was he or was he not a resident? And I submit to the Chair whether it should be gone into, and, if so, the limit that should be allowed, taking the position myself that under the statute it can not be an issuable fact.

I may say to the Chair that we might take up a week on this subject, and then every Senator and attorney might concur in the opinion that the question of convenience or inconvenience would not affect it in the least.

Mr. Manager James B. Perkins, of New York, said:

Mr. President, if I may make a suggestion to the Presiding Officer in reference to the suggestion made by the Senator from North Dakota, I will say that the suggestion just made entirely corresponds with what I suggested yesterday, when I asked a somewhat similar question of one of the witnesses. It is the view of the managers, as it is of the Senator, that this evidence is immaterial. The statute says, as the Senator has properly stated, that if the judge does not reside within his district it shall be a high misdemeanor, and whether convenience or inconvenience resulted is, in our judgment, wholly immaterial.

However, in the answer of the respondent, it is alleged that in his belief his absence from his district caused no inconvenience to suitors. To meet that, not knowing what the views of the Senate might be; not knowing but that some one might say, "Ah, well, this judge was absent, but it did no harm, and there was no inconvenience and no suitors suffered," we thought it might be well to offer some evidence on this subject.

But we are entirely content to take the ruling of the Chair that the evidence is immaterial and to offer no more of it, although we have other witnesses whom we could call. As the Senator has suggested, this is a branch on which indefinite evidence might be given if we saw fit to subpoena a sufficient number of lawyers.

Mr. John M. Thurston, of counsel for respondent, said:

Mr. President, counsel for the respondent fully agree with the position stated by the Senator from North Dakota [Mr. McCumber] and also the position as acquiesced in by the managers. We do not believe this testimony is material or relevant. We did, however, in framing our answer have in mind the fact before the committee of the House great stress had apparently been laid in the examination of witnesses upon testimony which they claimed tended to show that Judge Swayne's temporary absences from Florida had caused inconvenience to suitors and attorneys. Therefore we thought we were compelled to meet what had appeared in a previous investigation to be, in the theory of the managers, material. We do not believe it is.

We believe that the question of fact before the court is this, and only this: Did Judge Swayne have a residence in the district for which he was appointed? And that question of fact is in no wise changed or modified by reason of any further situation which may involve the convenience or the inconvenience of suitors or of attorneys.

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After further argument the Presiding Officer [13] said:

Unless some Senator desires to have the matter submitted to the Senate, the Presiding Officer thinks that this testimony has some bearing upon the question of residence: that so far as the question of inconvenience is concerned, that is not material to the issue.

And later, during cross-examination of the witness, the Presiding Officer said:

The Presiding Officer does not think that the evidence in relation to the inconvenience of this witness by reason of the absence of Judge Swayne from Florida or Pensacola is material or even admissible, but that so much of his testimony as proves the fact that the judge was absent from Florida at Guyencourt, Del., at certain times is admissible for what it is worth.

2224. A question being raised in the Swayne trial that certain evidence was immaterial, the pleadings were examined to determine whether or not the issue involved was raised.—On February 10, 1905,[14] in the Senate sitting for the trial of Judge Charles Swayne, Mr. Marlin E. Olmsted, of Pennsylvania, one of the managers, called Payne W. Chase, a witness, to prove the charge that the respondent had made false certificates of expenses.

Mr. Joseph W. Bailey, a Senator from Texas, said:

Mr. President, I may be mistaken as to the pleadings, but my understanding is that there is no issue as to the receipt and expenditure as alleged by the House, and that at most all that remains for the Senate to do is to determine the effect of the respondent having drawn the maximum allowance, and to determine, upon the state of the pleadings—it being alleged that he drew the money and did not expend it—what the law in that case is.

If I am right about that, I suggest that the calling of witnesses upon this charge, which involves the question of expense and receipt, would be a useless consumption of the time of the Senate.

Mr. Olmsted replied that an examination of the pleadings would show that the proposed testimony was necessary.

The Presiding Officer [13] said:

A cursory examination of the pleadings leads the Presiding Officer to the conclusion that there is no direct admission in the answer of the respondent that the expenses were actually less than the sum charged, and it seems that evidence may be introduced to show that they were less.

2225. A certified paper, bearing only indirectly on a question at issue, was ruled out in the Swayne trial.—On February 22, 1905,[15] in the Senate sitting for the impeachment trail of Judge Charles Swayne, Mr. Anthony Higgins, of counsel for the respondent, offered testimony in the following words:

Mr. President, on behalf of the respondent, I make the offer of a certified copy of the proceedings of the meeting of the board of county commissioners of Leon County, Fla., December 10, 1904. It is the board which was spoken of by a witness yesterday—Milton Jackson. I have presented the paper to the learned chairman of the managers, and would ask if there is any objection to it. * * * It is that the county commissioners of Leon County, Fla., in which is situated the city of Tallahassee, adopted a resolution at that time extending to Judge Swayne as the judge of the northern district of Florida, having to make a residence within his district, an invitation to reside in the city of Tallahassee. That evidence is before the court. The matter was brought to the attention of a witness (who has been examined here) by the Judge, who told him, the

[13] Orville H. Platt, of Connecticut, Presiding Officer.
[14] Third session Fifty-eighth Congress, Record, pp. 2240, 2241.
[15] Third session Fifty-eighth Congress, Record, p. 3145.

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witness testified, that he would not live in Tallahassee because he had taken his residence in Pensacola. It is a fact and a circumstance connected with the act of residence.

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to it as irrelevant, incompetent, and tending to throw no light on the subject-matter under discussion.

The Presiding Officer [16] said:

This paper is a certified copy of the action of the board of county commissioners, held in Tallahassee, being an invitation sent to Judge Swayne to make his permanent home in Tallahassee. The Presiding Officer does not see how it is evidence in this case. If any Senator desires, he will submit the question to the Senate. [A pause.] It is not admitted.

2226. In impeachment trials the rule that the best evidence procurable should be presented has been followed.

It was decided in the Belknap trial that a witness might not be examined as to the contents of an existing letter without the letter itself being submitted.

Instance wherein the President pro tempore ruled on evidence during an impeachment trial.

On April 4, 1868,[17] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Robert S. Chew, chief clerk of the State Department, was sworn as a witness on behalf of the House of Representatives, and examined by Mr. Manager Benjamin F. Butler as to the practice of making temporary appointments of assistant secretaries of Departments to perform the duties of their chiefs in the absence of the latter. The witness testified that the appointments in such cases were made by the President, or by his order. Mr. Butler then asked:

Did the letter of authority in most of these cases * * * proceed from the head of the Department or from the President?

Mr. William M. Evarts of counsel for the President, objected that the letter of authority showed from whom it came, and was the best evidence on that point.

In the discussion which followed, the counsel for the President intimated that they did not object if the question was intended to elicit a reply as to whose manual possession the paper came from. But if it was intended to ascertain who signed the paper, then the paper itself would be the best evidence.

Mr. Butler reduced the question to writing as follows:

Question. State whether any of the letters of authority which you have mentioned came from the Secretary of State or from what other officer?

The Chief Justice [18] thereupon made an inquiry which led to this colloquy:

The CHIEF JUSTICE. "Came from the Secretary of State." Do I understand you to mean signed by him?

Mr. Manager BUTLER. I am not anxious upon that part of it, sir. I am content with the question as it stands.

The CHIEF JUSTICE. The Chief Justice conceives that the question in the form in which it is put is not objectionable, but——

Mr. Manager BUTLER. I will put it, then, with the leave of the Chief Justice.

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[16] Orville H. Platt, of Connecticut, Presiding Officer.
[17] Second session Fortieth Congress, Globe supplement, p. 118.
[18] Salmon P. Chase, of Ohio, Chief Justice.

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The CHIEF JUSTICE. The Chief Justice was about to proceed to say that if it is intended to ask the question whether these documents of which a list is furnished were signed by the Secretary, then he thinks it is clearly incompetent without producing them.

Mr. Manager BUTLER. Under favor, Mr. President, I have no list of these documents; none has been furnished.

The CHIEF JUSTICE. Does not the question relate to the list which has been furnished?

Mr. Manager BUTLER. It relates to the people whose names have been put upon the list; but I have no list of the documents at all. I have only a list of the facts that such appointments were made, but I have no list of the letters, whether they came from the President or from the Secretary or from anybody else.

The CHIEF JUSTICE. In the form in which the question is put the Chief Justice thinks it is not objectionable. If any Senator desires to have the question taken by the Senate, he will put it to the Senate. [To the managers, no Senator speaking.] You can put the question in the form proposed.

Mr. Manager BUTLER (to the witness). State whether any of the letters of authority which you have mentioned came from the Secretary of State, or from what other officer.

Mr. CURTIS. I understand the witness is not to answer by whom they were sent.

Mr. Manager BUTLER. I believe I have this witness.

The CHIEF JUSTICE. The Chief Justice will instruct the witness. [To the witness.] You are not to answer at present by whom these documents were signed. You may say from whom they came.

2227. On July 10, 1876,[19] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, counsel for the respondent. The witness testified that he had proposed in a letter to Mr. James A. Garfield, a Member of the House of Representatives, to give information as to post traders, and as a result had been subpoenaed before the Military Committee in 1872. He also testified as to writing letters to the Secretary of War, General Belknap. Then Mr. Carpenter asked:

Q. Do you recollect a long letter to General Belknap dated September 12, 1875?

Witness replied that he did.

Thereupon Mr. Carpenter proposed to ask:

Do you recollect using these words, or substantially these words, in that letter to General Belknap, namely: "I was summoned to Washington to give evidence upon staff organization of the French and German armies. After finishing upon these subjects I was questioned upon the subject of post traders. I at first remonstrated, on the ground that I had not reported the matter to you" (that is, the Secretary), "because I believed the Commissary Department would defeat any action in that direction?"

Mr. Manager John A. McMahon objected, saying:

You have no right to cross-examine him in regard to the contents of a letter without submitting it to him. * * * If you say it is a memorandum of a letter that was destroyed, no matter; but if you claim to have the letter you can not cross-examine him on it without putting it in his hand.

We make objection, Mr. President and Senators, to the witness being asked any question as to the contents of a letter which the counsel apparently holds in his hand. If he does not have it, the objection at any rate goes to the point that it having been addressed to the defendant, the counsel must first show it to have been destroyed.

The question being submitted, the Senate, without division, excluded the question.

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[19] First session Forty-fourth Congress, Senate Journal, p. 970; Record of trial, pp. 231–233.

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Thereupon Mr. Carpenter said:

Mr. President, if the Senate will pardon me just a moment. I did not state the ground of the question, because I thought it was apparent. The witness has just sworn to a totally different state of facts; that he came here on subpoena and was examined on this matter in obedience to the subpoena. On cross-examination we got from him the fact that he wrote a letter to General Garfield from his post. Now, here is a letter, or at least I am inquiring of him now if he did not write to General Belknap, on the 12th of September, 1875, a totally different account of that transaction. * * * Senators will recollect that this witness testified here that he gave testimony before the House Military Committee, because he thought if he conferred directly with the Secretary of War he would not pay any attention to it. He then swears he did write a letter and sent it through the regular military channels, communicating everything to General Belknap that he swore to before the committee. In this letter, of which I now question him, he writes, as we claim and offer to prove by him, that he did not report the matter to the Secretary for the reason that he knew the Commissary Department would not permit it to be done.

Mr. George F. Edmunds, a Senator from Vermont, said: "The letter will show," to which Mr. Carpenter replied: "The letter I do not propose to give in evidence."

Objection being made to this debate, Mr. John H. Mitchell, a Senator from Oregon, moved to reconsider the vote whereby the evidence had been excluded.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, argued:

It seems to me that the ruling of the Senate is made upon a rare misconception of the question submitted by my colleague in this case. Here is a witness upon the stand who testifies that he wrote a certain letter to the Secretary of War, semiofficial or official, he does not know which, communicating facts in relation to abuses prevailing at these trading posts in the Indian country, and that the reason why he did not go to the Secretary of War rather than go before the Military Committee to testify about these abuses was that he had written such a letter and that it had received no attention. Now, we want to ask him—and it is perfectly competent: no lawyer I think will deny the competency of it—whether he had not stated to another person on another occasion directly the contrary of that, stating the person and the time, leaving us the liberty of calling in that person, of calling for that letter, and showing that he is here stultifying himself and falsifying himself. * * * I said that I believed every lawyer in this body would recognize the principle that it was perfectly competent to ask a witness whether or not he had on a different occasion given a different account of the same subject than that he now offers. * * * I have not investigated the subject fully; but it seems to me perfectly plain that a party may be called upon to say whether he had not at a different time to a different person made a different statement; and this letter falls entirely within the common practice of showing that a witness had made on a different occasion a different statement in regard to the same subject matter.

Mr. Manager McMahon said:

I think the Senate will discover that a while ago when I interrupted the witness when the contents of a letter were stated to him, I was right in regard to the law. I read now from an elementary book, Greenleaf on Evidence:

"§ 463. A similar principle prevails in cross-examining a witness as to the contents of a letter or other paper written by him. The counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. For the contents of every written paper, according to the ordinary and well-established rules of evidence, are to be proved by the paper itself, and by that alone, if it is in existence."

That is very simple; and I was right a while ago, notwithstanding the overpowering weight of the gentlemen on the other side.

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The Senate, without division, disagreed to the motion to reconsider.

2228. On July 12, 1876,[20] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and was asked this question by Mr. Matt. H. Carpenter, of counsel for the respondent:

Q. Were you instructed by General Belknap as Secretary of War at any time to investigate into the standing and character of Durfee & Peck?

Durfee had been partner of one Evans, who was alleged to have been corruptly appointed post trader at Fort Sill by the respondent, and Mr. Carpenter explained the purpose of the question:

Mr. Durfee was Evans's partner, and Mr. Evans informed the Secretary of War of that fact. The Secretary of War had his suspicion that Durfee & Peck or Durfee himself was not the proper man to be appointed, and we propose to show that he ordered this witness to proceed there and inquire into the matter; that he did inquire into it, not at that paricular post, but as to these men, and it was in consequence of that that Mr. Evans, who, it was understood, would go into company with Durfee if he was appointed, was not at that time appointed. Afterwards he did not form that partnership, and he was appointed without objection.

Mr. Manager McMahon objected to the question, saying that it was first desirable to know whether the instructions were written or verbal.

Thereupon Mr. Carpenter waived the question, and asked of witness:

Did you investigate?

Mr. Manager McMahon objected on the ground that the matter was all of record, and hence that the record would be the best evidence.

The question being submitted to the Senate, the journal and record of trial show that the objection was overruled without division, but no record of an answer by the witness appears, and Mr. Carpenter at once proceeded to another matter, as if the question had been excluded.

2229. On July 12, 1876,[21] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Maj. Gen. John Pope was examined as a witness on behalf of the respondent, and testified as to applications on the part of the post trader at Fort Sill for permits to sell liquor. The witness described the usual way in which such permits were forwarded to the War Department, and then Mr. Matt. H. Carpenter, of counsel for the respondent, asked:

Do you know any instance while General Belknap was Secretary of War, in which he overruled recommendations of the officers through whose hands the application had come?

Mr. Manager John A. McMahon objected, saying:

It seems to me, Mr. President, that the record ought to settle that question. Everything goes officially through the departments and the action of the Secretary of War upon it, favorable or unfavorable, ought to be proved by the record and not by the mere recollection of a witness who has had so many other transactions.

The question being submitted to the Senate, the objection was sustained without objection.

Very soon after Mr. Carpenter asked, and the witness began to answer, as follows:

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[20] First session Forty-fourth Congress. Senate Journal, p. 976; Record of trial, p. 258.
[21] First session Forty-fourth Congress, Record of trial, p. 256.

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Q. Do you recollect any applications in regard to licenses for selling liquor at Fort Sill while General Belknap was Secretary of War?—A. I remember an application, simply because I had occasion to look it up recently, that the officers at Fort Sill——

Mr. Manager McMahon said:

We object to this. The witness himself discloses the fact that he remembers it because he has recently seen the official documents. Now, I say that the official documents must be produced.

The President pro tempore [22] said:

The manager took exception that the record should be produced, and on the prior ruling of the Senate the Chair ruled that the objection was well taken. If the counsel prefers, the Chair will submit the question to the Senate.

No request was made that the question be submitted, and the examination proceeded: [23]

Q. (By Mr. Carpenter.) Do you know anything of the extension of the reservation about Fort Sill, and when it took place?—A. Fort Sill was a post established at the time I took command of the department. My predecessor in command, General Schofield, was written to from the War Department, I think, directing him to take some steps to have the reservation extended and properly surveyed——

Mr. Manager McMahon objected, saying:

I am obliged again to say that all these are matters of record. The gentleman has a client who understands all about getting copies of them, who is thoroughly informed, and we must certainly object to having oral testimony as to what is matter of record.

The Senate, without division, sustained the objection.

In relation to these decisions, Mr. Carpenter said:

General Pope is very anxious to get away from here and get back to his post, and we are willing to accommodate in every way to reach that result; but if the managers are to pursue the present captious course of objection and require these documents to be produced, they have got to be looked up in the Department, and General Pope will have to stay and swear in view of them; and after Mr. Evans arrives we shall then want him also in regard to two or three points that we can not inquire of now. * * * What I have spoken of now are these very matters that were covered by the questions that you objected we must get the records here to show. General Pope knows just as much about the matter without looking through forty pages as he will after he does that; but still the Senate has sustained the objection; and if you insist on it General Pope must remain. That is all.

Mr. Manager McMahon said:

We certainly must try the case according to the rules of evidence. We want to see the records themselves.

2230. In the Swayne trial hearsay testimony introduced to show inconvenience to litigants from respondent's conduct was ruled out.

Instance during the Swayne trial, wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 13, 1905,[24] in the Senate sitting for the trial of Judge Charles Swayne, John S. Beard was sworn and examined.

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[22] T. W. Ferry, of Michigan, President pro tempore.
[23] Senate Journal, pp. 975, 976.
[24] Third session Fifty-eighth Congress, Record, p. 2467.

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Mr. Manager James B. Perkins, of New York, asked:

Have you ever heard complaints made by counsel of inconvenience in their practice by reason of the absence of Judge Swayne from Florida?

Mr. John M. Thurston, of counsel for respondent, objected, saying:

We object to asking for hearsay testimony. If there are any such cases, the attorneys themselves are within call, and the honorable manager is asking this witness to state nothing more than what some other attorney may have said.

Mr. Manager Perkins said:

Well, Mr. President, how else can the matter of common reputation be proven? The answer of Judge Swayne it seems to us is immaterial. The law requires that he shall live in the district, and if he was not a resident it was a high misdemeanor. But in his answer it is alleged by way of palliation that he does not think inconvenience resulted to the bar. That we can only meet by evidence of this character.

The Presiding Officer [25] said:

The Presiding Officer will submit this question to the Senate. The manager asks the witness, having first inquired who were the lawyers who did most of the business before the district court, if this witness had heard them complain of inconvenience growing out of the absence of Judge Swayne. Objection is made. The Presiding Officer will submit that question to the Senate. Senators who think the question is a proper one will say "aye" [putting the question]; contrary, "no." In the opinion of the Chair the "noes" have it. The objection is sustained.

2231. Testimony as to what was said by the agent or coconspirator of respondent in regard to carrying out respondent's order, the said order being a ground of the impeachment, was admitted. Instance wherein the Chief Justice ruled on the admissibility of evidence during the Johnson trial.

On March 31, 1868,[26] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Walter A. Burleigh, Delegate in Congress from Dakota Territory, was sworn, and the examination was begun by Mr. Manager Benjamin F. Butler. Mr. Burleigh testified that he had known Lorenzo Thomas, Adjutant-General of the Army, for several years, and that he had called on General Thomas at his house on the evening of February 21 last, and had a conversation with him.

Thereupon Mr. Manager Butler asked a question which, on the succeeding day, was reduced to writing as follows:

You said yesterday, in answer to my question, that you had a conversation with Gen. Lorenzo Thomas on the evening of the 21st of February last. State if he said anything as to the means by which he intended to obtain, or was directed by the President to obtain, possession of the War Department? If so, state all he said as nearly as you can.

Mr. Henry Stanbery, of counsel for the President, objected to the question. In making his objection, Mr. Stanbery first reviewed the orders issued by the President to Mr. Secretary Stanton and to General Thomas, and continues:

Now, what proof has yet been made under the first eight articles? The proof is simply, so far as this question is concerned, the production in evidence of the orders themselves. There they are to speak for themselves. As yet we have not

[25] Orville H. Platt, of Connecticut, Presiding Officer.
[26] Second session Fortieth Congress, Senate Journal, pp. 867, 872–873; Globe supplement, pp. 59, 63–71.

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had one particle of proof of what was said by the President, either before or after he gave those orders or at the time that he gave those orders—not one word. The only foundation now laid for the introduction of this testimony is the production of the orders themselves. The attempt made here is, by the declarations of General Thomas, to show with what intent the President issued those orders; not by producing him here to testify what the President told him, but without having him, sworn at all, to bind the President by his declarations not made under oath; made without the possibility of cross-examination or contradiction by the President himself; made as though they are made by the authority of the President.

Now, Senators, what foundation is laid to show such authority, given by the President to General Thomas, to speak for him as to his intent, or even as to General Thomas's intent, which is quite another question. You must find the foundation in the orders themselves, for as yet you have no other place to look for it. Now, what are these orders? That issued to General Thomas is the most material one; but, that I may take the whole, I will read also that issued and directed to Mr. Stanton himself. He says to Mr. Stanton, by his order of February 21, 1868:

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipt of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge."

So much for that. Then the order to General Thomas of the same day is:

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"To Brevet Maj. Gen. LORENZO THOMAS,
"*Adjutant-General U.S. Army, Washington, D.C.*"

There they are; they speak for themselves; orders made by the President to two of his subordinates; an order directing one of them to vacate his office and to transfer the books and public property in his possession to another party, and the order to that other party to take possession of the office, receive a transfer of the books, and act as Secretary of War ad interim. Gentlemen, does that make them conspirators? Is that proof of a conspiracy or tending to have a conspiracy? Does that make General Thomas an agent of the President in such a sense as that the President is to be bound by everything he says and everything he does even within the scope of his agency?

Mr. Stanbery argued at length to show that General Thomas was an officer of the Government performing his duty under order of a superior officer, and in no sense an agent. Furthermore, he argued that no foundation had been laid for the introduction of such testimony.

Mr. Manager Benjamin F. Butler, replying, gave a brief résumé of the actions of the President in relation to Secretary of War Stanton:

He had come to the conclusion to violate the law and take possession of the War Office; he had come to the conclusion to do that against the law and in violation of the law; he had sent for Thomas, and Thomas had agreed with him to do that by some means if the President would give him the order, and thus we have the agreement between two minds to do an unlawful act; and that, I believe, is the definition of a conspiracy all over the world.

Let me restate this. You have the determination on the part of the President to do what had been declared to be, and is, an unlawful act; you have Thomas consenting; and you have therefore an agreement of two minds to do an unlawful act; and that makes a conspiracy, so far as I understand the law of conspiracy. So that upon that conspiracy we should rest this evidence under article seven, which alleges that—

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"Andrew Johnson * * * did unlawfully conspire with one Lorenzo Thomas, with intent unlawfully to seize, take, and possess the property of the United States in the Department of War in the custody and charge of Edwin M. Stanton."

And also under article five, which alleges a like unlawful conspiracy not alleging that intent.

Then there is another ground upon which this evidence is admissible, and that is upon the ground of principal and agent. Let us, if you please, examine that ground for a few moments. The President claims by his answer here that every Secretary, every Attorney-General, every executive officer of this Government exists by his will, upon his breath only; that they are all his servants only, and are responsible to him alone, not to the Senate or Congress or either branch of Congress; and he may remove them for such cause as he chooses; he appoints them for such cause as he chooses; and he claims this right to be illimitable and uncontrollable, and he says in his message to you of December 12, 1867, that if any one of his Secretaries had said to him that he would not agree with him upon the unconstitutionality of the act of March 2, 1867, he would have turned him out at once.

Mr. Butler cited as authorities Roscoe's Criminal Evidence (2 Carrington and Payne, p. 232), United States *v.* Goding (12 Wheaton, pp. 469, 470), and Greenleaf on Evidence.

These arguments as outlined were further amplified by Mr. Benjamin R. Curtis, of counsel for the President, and by Mr. Manager John A. Bingham.

And the question being put to the Senate, it was decided, yeas 39, nays 11, that the question proposed by Mr. Manager Butler should be put to the witness.

2232. On March 31, 1868,[27] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, was sworn and examined as to a certain visit which he made to the house of Gen. Lorenzo Thomas, of the Army.

The witness having testified that he saw General Thomas at the time of that visit, Mr. Manager Benjamin F. Butler asked:

Had you a conversation with him?

Mr. Henry Stanbery, of counsel for the President, asked the object of the question, to which Mr. Butler replied:

The object is to show the intent and purpose with which General Thomas went to the War Department on the morning of the 22d of February; that he went with the intent and purpose of taking possession by force; that he alleged that intent and purpose; that in consequence of that allegation Mr. Burleigh invited General Moorhead and went up to the War Office. The conversation which I expect to prove is this: After the President of the United States had appointed General Thomas and given him directions to take the War Office, and after he had made a quiet visit there on the 21st, on the evening of the 21st he told Mr. Burleigh that the next day he was going to take possession by force.

Mr. Stanbery [28] thereupon entered an objection.

The Chief Justice [29] said:

The Chief Justice thinks the testimony is competent.

2233. On April 1, 1868,[30] in the Senate during the impeachment trial of Andrew Johnson, President of the United States, Hon. Walter A. Burleigh, Delegate from Dakota Territory, a witness called by the managers, testified to conversation which he had had with Gen.

[27] Second sesion Fortieth Congress, Senate Journal, p. 867; Globe supplement, p. 59.
[28] The Senate Journal has Mr. William M. Evarts as entering the objection.
[29] Salmon P. Chase, of Ohio, Chief Justice.
[30] Second session Fortieth Congress, Senate Journal, pp. 872, 873; Globe supplement, pp. 71–72.

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Lorenzo Thomas, Adjutant-General of the Army, after the said Thomas had been ordered by President Johnson to supersede Secretary of War Stanton and take possession of the office.

Then Mr. Manager Benjamin F. Butler offered this question:

Question. Shortly before this conversation about which you have testified, and after the President restored Major-General Thomas to the office of Adjutant-General, if you know the fact that he was so restored, were you present in the War Department, and did you hear Thomas make any statements to the officers and clerks, or either of them, belonging to the War Office, as to the rules and orders of Mr. Stanton or of the office which he, Thomas, would revoke, relax, or rescind in favor of such officers and employees when he had control of the affairs therein? If so, state as near as you can when it was such conversation occurred, and state all he said as nearly as you can.

Mr. William M. Evarts, of counsel for the President, objected to the question as irrelevant and immaterial to any issue in the cause, and as not to be brought in evidence against the President by any support given by the testimony already in.

Mr. Manager Butler argued that the question was justified, because General Thomas was a coconspirator with the President:

You will observe the question carries with it this state of facts: Thomas had been removed from the office of Adjutant-General, for many years under President Lincoln, under the administration of Mr. Stanton, of the War Office. That is a fact known to all men who know the history of the war. Just before he made him Secretary of War ad interim the President restored Thomas to the War Office as the Adjutant-General of the Army. That was the first step to get him in condition to make a Secretary of War of him. That was the first performance of the President, the first act in the drama. He had to take a disgraced officer, and take away his disgrace, and put him into the Adjutant-General's office, from which he had been by the action of President Lincoln and Mr. Stanton suspended for years, in order to get a fit instrument on which to operate; get him in condition. That was part of the training for the next stage. Having got him in that condition, he being sufficiently virulent toward Mr. Stanton for having suspended him from the office of Adjutant-General, the President then is ready to appoint him Secretary ad interim, which he does within two or three days thereafter.

We charge that the whole procedure shows the conspiracy.

To this Mr. Evarts replied:

The question which led to the introduction of this witness's statements of General Thomas's statements to him, of his intentions, and of the President's instructions to him, General Thomas, was based upon the claim that the order of the President of the 21st of February, upon Mr. Stanton for removal, and upon General Thomas to take possession of the office, created and proved a conspiracy; and that thereafter, upon that proof, declarations and intentions were to be given in evidence. That step has been gained, and, in the judgment of this honorable court, in conformity with the rules of law and of evidence. That being gained, it is similarly argued that if, on a conspiracy proved, you can introduce declarations made thereafter, by the same rule you can introduce declarations made theretofore; and that is the only argument which is presented to the court for the admission of this evidence.

So far as the statements of the learned manager relate to the office, the position, the character, and the conduct of General Thomas, it is sufficient for me to say that not one particle of evidence has been given in this cause bearing upon any one of these topics. If General Thomas has been a disgraced officer; if these aspersions, these revilings are just, they are not justified by any evidence before this court. And if, as a matter of fact, applicable to the situation upon which this proof is sought to be introduced, the former employments of General Thomas and the recent restoration of him to the active duties of Adjutant-General are pertinent, let them be proved; and then we shall have at least the basis of fact of General Thomas's previous relations to the War Department, to Mr. Stanton, and to the office of Adjutant-General.

And, now, having pointed out to this honorable court that the declarations sought to be given in evidence of General Thomas to affect the President with

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his intentions are confessedly of a period antecedent to the date to which any evidence whatever before this court brings the President and General Thomas in connection, I might leave it safely there. But what is there in the nature of the general proof sought to be introduced that should affect the President of the United States with any responsibility for these general and vague statements of an officer of what he might or could or would do, if thereafter he should come into the possession of power over the Department?

At the end of the debate the Chief Justice [31] said:

The Chief Justice is of opinion that no sufficient foundation has been laid for the introduction of this testimony. He will submit the question to the Senate with great pleasure, if any Senator desires it. The question is ruled to be inadmissible.

Mr. Jacob M. Howard, of Michigan, a Senator, asked that the question be taken by the Senate; and being put, Shall the question proposed by Mr. Manager Butler be put to the witness? the yeas were 28 and the nays 22.

So the question was put.

2234. An alleged coconspirator was permitted to testify as to declarations of the respondent at a time after the act, the testimony being responsive to similar evidence on the other side.—On April 10, 1868,[32] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Lorenzo Thomas, Adjutant-General of the Army, was called as a witness on behalf of the President, and related the circumstances which occurred on February 21, 1868, when, in obedience to the direction of the President, he attempted to supersede Mr. Stanton as Secretary of War.

General Thomas having described his interview with Secretary Stanton, Mr. Henry Stanbery, of counsel for the President, proceeded with the examination:

Q. Did you see the President after that interview?—A. I did.
Q. What took place?

At this point Mr. Manager Benjamin F. Butler interposed an objection, as follows:

I object now, Mr. President and Senators, to the conversation between the President and General Thomas. Up to this time I did not object, as you observe, upon reflection, to any orders or directions which the President gave, or any conversation had between the President and General Thomas at the time of issuing the commission. But now the commission has been issued; the demand has been made; it has been refused; and a peremptory order given to General Thomas to mind his own business and keep out of the War Office has been put in evidence. Now, I suppose that the President, by talking with General Thomas, or General Thomas, by talking with the President, can not put in his own declarations for the purpose of making evidence in favor of himself. The Senate has already ruled by solemn vote, and in consonance, I believe, with the opinion of the Presiding Officer, that there were such evidence of common intent between these two parties as to allow us to put in the acts of each to bear upon the other; but I challenge any authority that can be shown anywhere that, in trying a man for an act before any tribunal, whether a judicial court or any other body of triers, testimony can be given of what the respondent said in his own behalf, and especially to his servant, and a fortiori to his coconspirator. A conspiracy being alleged, can it be that the President of the United States can call up any officer of the Army, and, by talking to him after the act has been done, justify the act which has been done?

Replying to this objection, Mr. Stanbery said:

But, says the learned manager, the transaction ended in giving the order and receiving the order, and you are to have no testimony of what was said by the

[31] Salmon P. Chase, of Ohio, Chief Justice.
[32] Second session Fortieth Congress, Senate Journal, p. 885; Globe supplement, pp. 137–140.

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President or General Thomas, except what was said just then, because that was the transaction; that was the res gestae. Does the learned gentleman forget his testimony? Does he forget how he attempted to make a case? Does he forget, not what took place in the afternoon between the President and General Thomas that we are now going into, but what took place that night? Does he forget what sort of a case he attempts to make against the President, not at the time when that order was given, nor before it was given, nor in the afternoon of the 21st, but under his conspiracy counts, the managers have undertaken to give in evidence that on the night of the 21st General Thomas declared that he was going to enter the War Office by force?

That is the matter charged as illegal; and the articles say that the conspiracy between General Thomas and the President was that the order should be executed by the exhibition of force, intimidation, and threats, and to prove that what has he got here? The declarations of General Thomas, not made under oath, as we propose to have them made, but his mere declarations, when the President was absent and could not contradict him—not, as now, under oath, and all the conversation when the President was present and could contradict or might admit. The honorable manager has gone into all that to make a case against the President of conspiracy; and not merely that, but proves the acts and declarations of General Thomas on the 22d; and not only that, but as late at the 9th of March, at the presidential level, brings a witness, with the eyes of all Delaware upon him [laughter], and proves by that witness, or thinks he has proved, that on that night General Thomas also made a declaration involving the President in this conspiracy, as a party to a conspiracy still existing to keep Mr. Stanton out of office.

Now, how are we to defend against these declarations made on the night of the 21st or the 22d, and again as late as the 9th of March? Does not the transaction run through all that time? How is the President to defend himself if he is allowed to introduce no proof of what he said to General Thomas after the date of the order? May he not call General Thomas? Is General Thomas impeached here as a coconspirator? Is his mouth shut by a prosecution? Not at all. He is free as a witness—brought here and sworn. Now, what better testimony can we have to contradict this alleged conspiracy than the testimony of one of the alleged conspirators; for if General Thomas did not conspire certainly the President did not conspire. A man can not conspire by himself.

The Chief Justice having submitted the question to the Senate, "Is the question admissible?" there appeared 42 yeas, 10 nays. So the question was admitted.

Later, in the examination of the same witness,[33] Mr. Stanbery asked this question:

Did the President at any time prior to or including the 9th of March authorize or direct you to use force, intimidation, or threats to get possession of the War Office?

Mr. Manager Butler objected to the introduction of such testimony. He said that the President had been impeached on February 22, and what directions he had given after that event were not to be a subject of testimony.

Mr. William M. Evarts, of counsel for the President, contended that, as the managers had introduced witnesses to prove what General Thomas said on March 9, it was competent to introduce evidence as to what the President had actually done.

The Senate, without division, admitted the question.

2235. In general during impeachment trials questions as to conversations with third parties, not in presence of respondent, have been excluded from evidence.—On March 8, 1803,[34] in the high court of impeachment during the trial of John Pickering, judge of the United States district court of New Hampshire, Mr. Jonathan

[33] Senate Journal, p. 886; Globe supplement, p. 141.
[34] First session Eighth Congress, Annals, pp. 358, 359.

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Steele was testifying, when Mr. Joseph H. Nicholson, of Maryland, chairman of the managers for the House of Representatives, addressed the court. He said he wished in case it should be deemed proper by the court, to ask one of the witnesses whether he had conversed with the family physician of Judge Pickering, and what his opinion was as to the origination of his insanity. Mr. Nicholson observed that he had doubts of the propriety of this question, and therefore, in the first instance, stated it to the court.

The court decided the question inadmissible.

Later, on the same day, this witness, in the course of his testimony, was going on to state some conversation he had with Judge Pickering's physician at this time which he was induced to ask in consequence of solicitude to gain true information as to the reported intemperance of the Judge, when he was interrupted by the Court,[35] and informed that this species of testimony had been already decided to be inadmissible.

2236. On July 10, 1876,[36] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States. It was alleged in the articles of impeachment that Marsh, in collusion with the respondent, had effected the appointment of one Evans as post trader at Fort Sill, and that in consideration thereof Marsh had received from Evans certain sums of money which had been shared with the respondent. The witness being examined as to a contract between himself and Evans as to the payment of the above-mentioned sums of money, identified a paper presented to him as that contract. Then these questions were put and answered:

Q. Did Mr. Evans sign that paper with you?—A. He did.

Q. This agreement was reduced to writing in New York City. State whether it was agreed to before it was reduced to writing, and, if so, where. In other words, whether you came to any understanding in Washington before you went to New York City.—A. We came to an understanding as to the amount he was willing to pay, if I would allow him to hold the post and continue the business at Fort Sill.

Q. In that connection, without further questions, give us all that passed between you and Mr. Evans prior to the execution of this contract.

To the last question Mr. Matt. S. Carpenter, of counsel for the respondent, objected, saying:

The Senate, of course, will observe that this calls for a conversation between the witness and a third person, not in our presence, with no pretense that we know anything about it.

The President pro tempore said:

The question is on the admission of the interrogatory.

The question was decided in the negative.

2237. On July 11, 1876,[37] in the Senate sitting for the impeachment trial of Wiliam W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, and had testified to sending to the respondent sums of money which he had received in pursuance to his contract with one

[35] Aaron Burr, of New York, Vice President, was presiding.
[36] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, p. 225.
[37] First session Forty-fourth Congress, Senate Journal, pp. 971–973; Record of trial, pp. 238–241.

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Evans, the post trader at Fort Sill. Mr. John A. Logan, a Senator from Illinois, proposed this question:

Prior to the sending of the first money, had you said anything to any person or had any person ever said anything to you on the subject of sending money to General Belknap; if so, who was it?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the question, but the Senate without division decided that it might be asked.

The witness replied that he had had a conversation with the present Mrs. Belknap. It was before he had sent any money to respondent, but he had sent money to her.

Thereupon Mr. Logan asked:

State what the conversation was.

Mr. Manager John A. McMahon objected to the interrogatory, saying:

Even if General Belknap was present, while we might have called it as against him, he can not produce it as in his favor. It is the conversation of a third party. * * * Before the vote is taken, Senators, I desire that all shall understand the precise conversation now called for. It is a conversation between the witness and the present Mrs. Belknap, occurring on the night of the funeral of the second Mrs. Belknap, between the witness and her, not in the presence of General Belknap; a conversation between the two persons on that occasion. Clearly it seems to me the defendant is not at liberty to produce that conversation in his behalf.

The question being taken on the admissibility of the question, there appeared yeas 18, nays 23. So the objection was sustained.

Mr. Henry L. Dawes, a Senator from Massachusetts, then proposed this question:

State all the knowledge or information that General Belknap had, which it is in your power to state, as to the amount of any money sent him or the source whence it came, other than what you have already stated.

Mr. Carpenter having objected, the Senate without division admitted the question.

Mr. John A. Logan proposed this question:

Did you have any agreement with any person other than General Belknap in reference to sending the money you have testified to or any part of it? If so, with whom was such agreement and what was such agreement?

Mr. Manager McMahon objected, and Mr. Manager Elbridge G. Lapham said:

Our objection is that this calls for a conversation with a third person, and is the precise question upon which the Senate has already passed. The witness having stated expressly that he had no conversation with the defendant, the question calls for some express conversation, some expression, agreement, or understanding, and not for an implied or inferential understanding from the acts of the parties.

After argument by managers and counsel, Mr. Frederick T. Frelinghuysen, a Senator from New Jersey, said:

As I understand it, the court, exercising its privilege and against the objection of the respondent, permitted it to be proven that there was a conversation which had relation in some manner to these payments. I think it is the right of the respondent that that conversation should now be given. It was the court, not the respondent, who introduced the fact that there was such conversation that had relation to these payments. I do not think we can fairly exclude the conversation.

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Mr. George F. Edmunds, a Senator from Vermont, dissented from the law of the proposition made by Mr. Frelinghuysen.

The Senate, by a vote of 25 yeas, 21 nays, admitted the question.

The witness answered:

I had a conversation with Mrs. Bower, the present Mrs. Belknap, on the night of the funeral. She asked me to go upstairs with her to look at the baby in the nursery. I said to her, as near as I can remember, "This child will have money coming to it after a while." She said, "Yes; my sister gave the child to me, and told me the money coming from you I must take and keep for it." I am not certain about the rest of the conversation. I have an indistinct impression of what was said afterwards. I said, very likely, "All right; but perhaps the father ought to be consulted," and her reply was that if I sent the money to him she would get it any way for the child, or something of that kind. That is as far as I remember it; but I had some understanding: I have sometimes thought that I said something to General Belknap that night. My entire recollection is indistinct about the matter, except her relation of her sister's dying request made an impression on me more than any other part of the conversation.

2238. In the Johnson trial declarations of respondent, made anterior to the act, and even concomitant with it, were held inadmissible as evidence.

Instance wherein a decision of the Chief Justice as to the admissibility of evidence was overruled by the Senate.

The Senate, in the Johnson trial, declined to exclude evidence as to fact on the ground that it might lead to evidence as to declaration.

Leading questions were ruled out during the Johnson trial.

Citation of English precedents as to evidence during the Johnson trial.

On April 11, 1868,[38] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President. The witness had testified that between December 4, 1867, and February 4, 1868, he had several interviews with the President relating to Mr. Stanton, Secretary of War. Thereupon Mr. Henry Stanbery, of counsel for the President, asking as to a certain specified interview, propounded this question:

In that interview, what conversation took place between the President and you in regard to the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler objected to the question.

The Chief Justice[39] said at once, before argument:

The Chief Justice thinks the question admissible within the principle of the decision made by the Senate relating to a conversation between General Thomas and the President;[40] but he will put the question to the Senate, if any Senator desires it.

The managers, having persisted in objection, an argument arose, Mr. Stanbery saying:

When a prosecution is allowed to raise the presumption of guilt from the intent of the accused by proving circumstances which raised that presumption against him, may he not rebut it by proof of other circumstances which show that he could not have had such a criminal intent? Was anything ever plainer than that?

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[38] Second session Fortieth Congress, Senate Journal, p. 887; Globe supplement, pp. 150–157.

[39] Salmon P. Chase, of Ohio, Chief Justice.

[40] See section 2234 of this work.

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Why, consider what a latitude one charged with crime is allowed under such circumstances. Take the case of a man charged with passing counterfeit money. You must prove his intent; you must prove his scienter; you must prove circumstances from which a presumption arises; did he know the bill was counterfeit? You may prove that he had been told so; prove that he had seen other money of the same kind, and raise the intent in that way. Even when you make such proof against him arising from presumptions, how may he rebut that presumption of intent from circumstances proved against him? In the first place, by the most general of all persumptions—proof of good character generally. That he is allowed to do to rebut a presumption—the most general of all presumptions—not that he did what was right in that transaction, not that he did certain things or made certain declarations about the same time which explained that the intent was honest, but going beyond that through the whole field of presumptions, for it is all open to him, he may rebut the presumption arising from proof of express facts by the proof of general good character, raising the presumption that he is not a man who would have such an intent. * * * Now, what evidence is a defendant entitled to whom is charged with crime where it is necessary to make out an intent against him where the intent is not positively proved by his own declarations, but where the intent to be gathered by proof of other facts, which may be guilty or indifferent, according to the intent? What proof is allowed against him to raise this presumption of intent? Proof of those facts from which the mind itself infers a guilty intention. But while the prosecution may make such a case against him by such testimony, may he not rebut the case by exactly the same sort of testimony? It is a declaration that they rely upon as made by him at one time, may he not meet it by declarations made about the same time with regard to the same transaction? Undoubtedly. They cannot be too remote, I admit that; but if they are about the time, if they are connected with the transaction, if they do not appear to have been manufactured, then the declarations of the defendants, from which the inference of innocence would be presumed, are, under reasonable limitations, just as admissible as the declarations of the defendant from which the prosecution has attempted to deduce the inference of criminal purpose.

Mr. Stanbery proceeded to cite from the State trials, p. 1065, the trial of Hardy.

Replying, Mr. Manager Butler said:

The learned gentleman from Ohio says what? He says "in a counterfeiter's case we have to prove the scienter." Yes, true; and how? By showing the passage of other counterfeit bills? Yes; but, gentleman, did you ever hear, in a case of counterfeiting, the counterfeiter prove that he did not know the bill was bad by proving that at some other time he passed a good bill? Is not that the proposition? Why try the counterfeit bill, which we have nailed to the counter, of the 21st of February; and, in order to prove that he did not issue it, he wants to show that he passed a good bill on the 14th of January. It does take a lawyer to understand that. That is the proposition.

We prove that a counterfeiter passed a bad bill—I am following the illustration of my learned opponent. Having proved that he passed a bad bill, what is the evidence he proposes? That at some other time he told somebody else, a good man, that he would not pass bad money, to give it the strongest form; and you are asked to vote it on that reason. I take the illustration. Is there any authority brought for that? No.

What is the next ground? The next is that it is in order to show Andrew Johnson's good character. If they will put that in testimony I will open the door widely. We shall have no objection whenever they offer that. I will take all that is said of him by all good and loyal men, whether for probity, patriotism, or any other matter that they choose to put in issue. But how do they propose to prove good character? By showing what he said to a gentleman. Did you ever hear of good character, lawyers of the Senate? Laymen of the Senate, did you ever a good character proved in that way? A man's character is in issue. Does he call up one of his neighbors and ask what the man told him about his character? No; the general speech of people in the community, what was publicly known and said of him, is the point, and upon that went Hardy's case.

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But, then, look at the vehicle of proof. What is the vehicle of proof? They do not propose to prove it by his acts. When they are offered, I shall be willing to

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let them go in. Let them offer any act of the President about that time, either prior or since, and I shall not object, although the Senate ruled out an act in Cooper's case. But how do they propose to prove it? "What conversations took place between the President and you?" I agree, gentlemen of the Senate—I repeat it even after the criticisms that have been made—that you are a law unto yourselves. You have a right to receive or reject any testimony. All the common law can do for you is, that being the accumulation of the experience of thousands of years of trial, it may afford some guide to you; but you can override it. You have no right, however, to override the principles of justice and equity, and to allow the case of the people of the United States to be prejudiced by the conversations of the criminal they present at your bar, made in his own defense before the acts done, which the people complain of. That I may, I trust, without offense say, because there is a law that must govern us at any and all times, and the single question is—I did not mean to trouble the Senate with it before, and never will again on this question of conversation—what limit is there? If this is allowable, you may put in his conversations with everybody; you may put in his conversations with newspaper reporters—and he is very free with those, if we are to believe the newspapers. If he has a right to converse with General Sherman about this case and put that in, I do not see why he has not a right to converse with Mack, and John, and Joe, and J.B., and J.B.S., and T.R.S., and X.L.W., or whoever he may talk with, and put all that in.

I take it that is no law which makes a conversation with General Sherman any more competent than a conversation with any other man.

Mr. William M. Evarts, of the President's counsel, said:

And now I should like to look first to the question of the point of time as bearing upon the admissibility of this evidence. Under the eleventh article, the speech of the 18th of August, 1866, is alleged as laying the foundation of the illegal purposes that culminated in 1868, to point the criminality, that is what made the subject of accusation in that article. Proof, then, of the speeches of 1866 is made evidence under this article eleven, that imputes not criminality in making the speech, but in the action afterwards pointed by the purpose of the speech. So, too, a telegram to Governor Parsons, in January, 1867, is supposed to be evidence as bearing upon the guilt completed in the year 1868.

So, too, the interview between Wood, the office seeker, and the President of the United States, in September, 1866, is supposed to bear in evidence upon the question of intent in the consummation of the crime alleged to have been completed in 1868. I apprehend therefore that on the question of time this interview between General Sherman and the President of the United States, in the very matter of the public transaction of the President of the United States changing the head of the War Department, which was actually completed in February, 1868, is near enough to point intent and to show honest purpose, if these transactions, thus in evidence, are near enough to bear upon the same attributed crimes.

There remains, then, only this consideration, whether it is open to the imputation that it is a mere proof of declarations of the President concerning what his motives and objects were in reference to his subsequent act in the removal of Stanton. It certainly is not limited to that force or effect. Whenever evidence of that mere character is offered that question will arise to be disposed of; but as a part of the public action and conduct of the President of the United States in reference to this very office, and his duty and purpose in dealing with it, and on the very point, too, as to whether that object was to fill it by unwarrantble characters tending to a perversion or betrayal of the public trust, we propose to show his consultations with the Lieutenant-General of the armies of the United States to induce him to take the place.

On the other question of whether his efforts are to create by violence a civil war or bloodshed, or even a breach of the peace, in the removal of the Secretary of War, we show that in this same consultation it was his desire that the Lieutenant-General should take the place in order that by that means the opportunity might be given to decide the differences between the Executive and Congress as to the constitutitonal powers of the former by the courts of law. If the conduct of the President in relation to matters that are made the subject of inculpation, and of inculpation through motives attributed through designs supposed to be proved, can not be made the subject of evidence, if his public action, if his public conduct, if the efforts and the means that he used in the selection of agents are not to be received to rebut the intentions or presumptions that are sought to be

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raised against him, well, indeed, was my learned associate justified in saying that this is a vital question. Vital in the interests of justice, I mean, rather than vital to any important considerations of the cause.

Mr. Manager James F. Wilson, quoted the Hardy case, over which a dispute had arisen:

My principal purpose is to get before the minds of Senators the truth in the Hardy case as it fell from the lips of the Chief Justice, when he passed upon the question which had been propounded by Mr. Erskine and objected to by the attorney-general. The ruling is in these words:

"LORD CHIEF JUSTICE EYRE. Mr. Erskine, I do not know whether you can be content to acquiesce in the opinion that we are inclined to form upon the subject, in which we go a certain way with you. Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner and are not evidence for him, because the presumption upon which declarations are evidence is, that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself. Those declarations, if offered as evidence, would be offered therefore upon no ground which entitled them to credit. That is the general rule. But if the question be—as I really think it is in this case, which is my reason now for interposing—if the question be, what was the political speculative opinion which this man entertained touching a reform of Parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place.

"Mr. ERSKINE Just so, that is my question; only that I may not get into another debate, I beg your lordship will hear me a few words.

"LORD CHIEF JUSTICE EYRE. I think I have already anticipated a misapprehension of what I am now stating, by saying that if the declaration was meant to apply to a disavowal of the particular charge made against this man that declaration could not be received; as for instance, if he had said to some friend of his: When I planned this convention, I did not mean to use this convention to destroy the king and his Government, but I did mean to get, by means of this convention, the Duke of Richmond's plan of reform, that would fall within the rule I first laid down; that would be a declaration, which being for him, he could not be admitted to make, though the law will allow a contrary declaration to have been given in evidence. Now, if you take it so, I believe there is no difficulty."

And upon that ruling the question was changed as read by my associate manager, and correctly read by him, and all that followed this ruling of the chief justice and the subsequent discussion was read by my associate manager. The lord chief justice further said:

"You may put the question exactly as you propose."

That is, after discussion had occurred subsequent to the ruling of the chief justice to which I have referred, and in which a change in the character of the original question was disclosed.

"I confess I wished by interposing to avoid all discussion, because I consider what we are doing, and whom we have at that bar, and in that box, who are suffering by every moment's unnecessary delay in such a cause as this.

"Mr. ERSKINE. I am sure the jury will excuse it; I meant to set myself right at this bar: this is a very public place."

Then follows the question—

"Mr. DANIEL STUART examined by Mr. Erskine:

"Did you before the time of this convention being held, which is imputed to Mr. Hardy, ever hear from him what his objects were, whether he has at all mixed himself in that business?

"I have very often conversed with him, as I mentioned before, about his plan of reform; he always adhered to the Duke of Richmond's plan."

* * * * * * *

And which declaration came within the exception to the rule laid down by the chief justice. The final question was then put:

"From all that you have seen of him, what is his character for sincerity and truth?

"I have every reason to believe him to be a very sincere, simple, honest man."

To which the attorney-general said:

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"If this had been stated at first to the question meant to be asked, I do not see what possible objection I could have to it."

* * * * * * *

That remark applies to the last question. The remark was made after the last question was put; but, as I understand it the two questions are substantially the same and are connected, and the remark of the attorney-general applied to both, as the first was but the basis the inducement to the last.

* * * * * * *

Now, what is the question which has been propounded by the counsel on the part of the President to General Sherman? It is this:

"In that interview what conversation took place between the President and you in regard to the removal of Mr. Stanton?"

Now, I contend that that calls for just declarations on the part of the President as fall within the rule laid down by the chief justice in the Hardy case, and therefore must be excluded. If this conversation can be admitted, where are we to stop? Who may not be put upon the witness stand and asked for conversations had between him and the President, and at any time since the President entered upon the duties of the presidential office, to show the general intent and drift of his mind and conduct during the whole period of his official existence?

* * * * * * *

We certainly must insist upon the well known and long established rule of evidence being applied to this particular objection, for the purpose of ending now and forever, so far as this case is concerned, these attempts to put in evidence the declarations of the President, made, it may be, for the purpose of meeting an impeachment by such weapons of defense.

It is offered to be proved now, as the counsel inform us, that the President told General Sherman that he desired him to accept an appointment of Secretary for the Department of War to the end that Mr. Stanton might be driven to the courts of law for the purpose of testing his title to that office.

At the conclusion of the arguments the Chief Justice said:

Senators, the Chief Justice has expressed the opinion that the question now proposed is admissible within the vote of the Senate of yesterday. He will state briefly the grounds of that opinion. The question yesterday had reference to a conversation between the President and General Thomas after the note addressed to Mr. Stanton was written and delivered, and the Senate held it admissible. The question to-day has reference to a conversation relating to the same subject-matter, between the President and General Sherman, which occurred before the note of removal was written and delivered. Both questions were asked for the purpose of proving the intent of the President in the attempt to remove Mr. Stanton. The Chief Justice thinks that proof of a conversation shortly before a transaction is better evidence of the intent of an actor in it than proof of a conversation shortly after the transaction. The Secretary will call the roll.

The question being put, "Is the question admissible?" there appeared yeas 23, nays 28. So the question was ruled out.

Mr. Stanbery next asked:

General Sherman, in any of the conversations of the President while you were here, what was said about the department of the Atlantic?

Mr. Manager Butler objected that this question fell within the ruling just made.

Thereupon Mr. Stanbery proposed the question in this form:

What do you know about the creation of the department of the Atlantic?

Mr. Manager Butler said:

We have no objection to what General Sherman knows about the creation of the department of the Atlantic, provided he speaks of knowledge and not from the declarations of the President. All orders, papers, his own knowledge, if he has any, if it does not come from declarations, we do not object to.

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The Chief Justice said:

The counsel for the President will be good enough to state whether in this question they include statements made by the President.

To this Mr. Stanbery replied:

Not merely that; what we expect to prove is in what manner the department of the Atlantic was created; who defined the bounds of the department of the Atlanitc; what was the purpose for which the department was arranged.

It was also developed by a question from the Chief Justice that the conversation referred to was prior to the attempted removal of Mr. Stanton.

The question being put, the Senate decided [41] without division that the question was not admissible.

Mr. Stanbery then asked this question:

Did the President make any application to you respecting the acceptance of the duties of Secretary of War ad interim.

Mr. Manager Butler said:

I am instructed, Mr. President, to object to this, because an application can not be made without being either in writing or in conversation, and then either would be the written or oral declaration of the President, and it is entirely immaterial to this issue.

Mr. William M. Evarts said:

Mr. Chief Justice and Senators, the ground, as we understand it, upon which the offer, in the form and to the extent in which our question which was overruled sought to put it, was overruled, was because it proposed to put in evidence declarations of the President as if statements of what he was to do or what he had done. We offer this present evidence as executive action of the President at the time and in the direct form of a proposed devolution of office then presently upon General Sherman.

Mr. Butler objected that under the guise of proving an act it was proposed to get in a conversation.

The question being put, the Senate decided without division that the question was admissible.[42]

The question having been put, and General Sherman having testified that the President had tendered him the office of Secretary of War ad interim on two occasions, Mr. Stanbery then asked:

At the first interview at which the tender of the duties of the Secretary of War ad interim was made to you by the President did anything further pass between you and the President in reference to the tender or your acceptance of it?

In response to a question by Mr. Manager Butler as to the scope of the question, Mr. Stanbery stated that the question was intended to draw out the declarations concomitant with the act.

Mr. Buler thereupon entered an objection to the question on the ground that it contemplated an evasion of the principles of the ruling heretofore made. He said:

My proposition is, objecting to this evidence, that the evidence is incompetent and is based upon first getting in an act which proved nothing and looked to be immaterial, so that it was quite liberal for Senators to vote it in, but that liberality is taken advantage of to endeavor to get by the ruling of the Senate and put in declarations which the Senate has ruled out.

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[41] Senate Journal, p. 888; Globe Supplement, p. 157.
[42] Senate Journal, p. 888; Globe Supplement, pp. 157, 158.

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Mr. Evarts argued:

The tender of the War Office by the Chief Executive of the United States to a general in the position of General Sherman is an Executive act, and as such has been admitted in evidence by this court. Like every other act thus admitted in evidence as an act, it is competent to attend it by whatever was expressed from one to the other in the course of that act to the termination of it. And on that proposition the learned manager shakes his finger of warning at the Senators of the United States against the malpractices of the counsel for the President. Now, Senators, if there be anything clear, anything plain in the law of evidence, without which truth is shut out, the form and features of the fact permitted to be proved excluded, it is this rule that the spoken act is a part of the attending qualifying trait and character of the act itself.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 23, nays 29. So the question was ruled out.[43]

Mr. Stanbery then asked:

In either of these conversations did the President say to you that his object in appointing you was that he might thus get the question of Mr. Stanton's right to the office before the Supreme Court?

Mr. Manager Butler objected to this question as leading in form, and as inadmissible within the decisions already made.

The Senate, by a vote of yeas 7, nays 44, decided that the question was not admissible.[44]

Mr. Stanbery then asked:

Was anything said at either of those interviews by the President as to any purpose of getting the question of Mr. Stanton's right to the office before the courts?

Mr. Stanbery explained that the preceding question seemed to have been overruled because of its form, and he now changed the form as he did not want it thrown out on a technicality.

Mr. Manager Butler objected to the question on the ground that it was incompetent under the rules of evidence to offer in another form a question ruled out as leading, saying:

I had the honor to say to the Senate a little ago that all the rules of evidence are founded upon good sense, and this rule is founded on good sense. It would do no harm in the case of this witness; but the rule is founded on this proposition: that counsel shall not put a leading question to a witness, and thus instruct him what they want him to say, and then have it overruled and withdraw it, and put the same question in substance, because you could always instruct a witness in that way. Of course, that was not meant here, because I assume it would do no harm in any form, and the counsel would not do it; but I think the Senate should hold itself not to be played with in this way.

The Senate without division decided that the question should not be admitted.[45]

Thereupon Mr. John B. Henderson, of Missouri, a Senator, proposed this question in writing:

Did the President, in tendering you the appointment of Secretary of War ad interim, express the object or purpose of so doing?

Mr. Manager John A. Bingham, on behalf of the House of Representatives, objected to the question as both leading and incompetent.

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[43] Senate Journal, p. 888; Globe Supplement, p. 158.
[44] Senate Journal, pp. 889; Globe Supplement, 158, 159.
[45] Senate Journal, p. 889; Globe Supplement, p. 159.

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The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 25, nays 27. So the question was ruled out.[46]

Mr. Stanbery then proposed this question:

At either of these interviews was anything said in reference to the use of threats, intimidation, or force to get possession of the War Office, or the contrary?

Mr. Manager Butler objected to the question, as falling within the rule already established.

The Senate, without division, sustained the objection.[47]

2239. Evidence as to statements of Judge Swayne to prove intention as to residence and made before impeachment proceedings were suggested was the subject of diverse rulings during the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 22, 1905,[48] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Milton Jackson, a witness for the respondent, was examined by Mr. Anthony Higgins, of counsel for the respondent, as to a conversation which he had with Judge Swayne several years previous to the impeachment in reference to the latter's place of residence, and this question was asked:

Q. (By Mr. Higgins.) What did the Judge state at that time about the subject of his residence?

To that I object, Mr. President, The statement of Judge Swayne, which we offered to prove, were excluded, of course, for a different reason, but certainly there is no rule of law which allows the statements of the respondent to be put in evidence in his own behalf. That, of course, is fundamental. No man can prove what he has done or what he has not done by his own statements as to what he did or purposed to do. There is no more fundamental rule of evidence than the respondent's statements can not be proved in his favor. If that were so, all Judge Swayne would have to do would be to state that he resided in Florida, and that would make him a resident of Florida, or be evidence of his residence there.

Mr. Higgins replied:

I submit to the Senate that this question is eminently proper as a verbal fact, an act of the judge, ante litem motam, before this matter was mooted, years before, in the announcement to his nearest of kin as to his residence at that time. In order to make clear to the Senate the question upon which it is asked to pass, I will say that the authorities of Leon County, Fla., in which is the city of Tallahassee, gave an invitation to Judge Swayne, written and engrossed, to make his residence and home there, and that this was shown to this witness, and that the Judge gave them reasons why he could not accept that offer, because of where he had elected to live. If that is not fair testimony and within the rule, I do not know what is. It was long before this question was ever raised, not with any view of the possibility of any such proceeding as this. The statement is admissible for a double reason—that he was not going to accept that offer; that the offer was made very shortly after the act of Congress was passed, and therefore the question arose at that time; and in rejecting that invitation he did it because he had elected to reside, as the witness will state, elsewhere in his district and with reference to the requirements of that act.

Now, we have made that statement in answer as a substantive part of the defense, that he announced at that time his intention as to where he expected to live as a proper thing for him to do, and it is an act which I submit it is eminently proper for us to be able to prove.

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[46] Senate Journal, p. 889; Globe Supplement, pp. 159, 160.
[47] Senate Journal, p. 890; Globe Supplement, p. 140.
[48] Third session Fifty-eighth Congress, Record, pp. 3057, 3058.

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In reply Mr. Manager Perkins argued:

In other words, Mr. President, the offer of the counsel is this when we analyze it: The question being whether Judge Swayne as a matter of fact became a resident of the northern district of Florida, they can prove that by showing by another witness that Judge Swayne said he intended to become a resident. You can prove a fact. You can prove what a man did; what he was bound to do; that he became a resident. How—by showing what he did? No; but by proving that he said to some one else he intended to become a resident.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

I find that in the trial of Andrew Johnson, page 207 of the proceedings as reported in the Globe, it was offered for the counsel by the respondent to prove in these words:

"We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of Mr. Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: 'Supposing Mr. Stanton should oppose the order?' The President replied: 'There is no danger of that, for General Thomas is already in the office,' etc."

Mr. Manager Butler having objected, Mr. Manager Wilson said:

Mr. President, as this objection is outside of any former ruling of the Senate and is perfectly within the rule laid down in Hardy's case—the celebrated English impeachment case—and cited this ruling from that case, which may be found in 24 State Trials, page 1096:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself."

The Chief Justice submitted the question to the Senate whether it should be admitted, and the vote was, yeas 9 and nays 37. So the question was rejected. There you have precedent both English and American.

The Presiding Officer [49] said:

The Presiding Officer will state the question. Counsel for the respondent offered to prove, as affecting the question of his residence, statements made by the respondent to the witness in the year 1894 or 1895 as to where it was his intention to reside. This is the question which is submitted to the Senate.

Mr. HIGGINS. I wish further to say that I intend also to put to the witness the question as to where the Judge stated at the time he did reside.

Mr. Manager OLMSTED. That would be equally objectionable.

The PRESIDING OFFICER. And, further the statements made by Judge Swayne at that time as to where his residence was. Senators in favor of the admission of such testimony will say "aye," opposed "no." [Putting the question.] In the opinion of the Presiding Officer the "ayes" have it. The "ayes" have it. The counsel will ask the question.

On February 23 [50] a witness, Charles F. Warwick, was examined by Mr. Anthony Higgins, of counsel for the respondent, who asked:

Q. Do you know Judge Charles Swayne?—A. Very well.

Q. How long have you known him?—A. Ever since I came to the bar. I think I knew him before that intimately.

Q. Intimately, you say?—A. Intimately.

Q. Do you remember the fact of the act of Congress curtailing his district?—A. I do.

Q. Will you please state whether on or about or after that time, and fix the time yourself, you had any conversation with him, and he with you, concerning where he would make his residence in Florida?

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[49] Orville H. Platt, of Connecticut, Presiding Officer.
[50] Record, pp. 3145, 3146.

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Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that testimony as being irrelevant and incompetent. The declaration of the respondent as to where he intended to reside is, in our judgment, not evidence in this case.

Mr. Porter J. McCumber, a Senator from North Dakota, said:

Mr. President, before submitting the matter to the Senate, I wish counsel would inform the Senate on what principle of law he justifies a proposition to introduce in evidence a self-serving declaration of a party defendant in a criminal proceeding.

Mr. Higgins said:

Mr. President, I had the honor to submit some remarks upon that question yesterday. We contend that such an assertion made before the present impeachment proceedings were mooted or expected, or as the maxim of the law has it ante litem motam, is itself essentially a verbal fact. Residence is made up of two elements—intention and action. Intent without action is futile to make a residence, but intention becomes a most important part of the proposition in the end as to what constitutes residence. As I have said and admitted, alone it will not make it, but it is a part of a whole in which it takes its own due proportion.

Now, if this were a self-serving assertion, made after the fact, if it came into the case in such a way it would be so clearly objectionable that it never would be presented by counsel for the respondent. But we submit it is a most important thing. When the good faith of the conduct of the respondent is in dispute, we bring here a witness of the highest character and standing to prove what at that time was the expressed intention of the respondent in respect to establishing his residence. I think therefore that, while admitting the principle upon which the distinguished Senator raises his question, we have brought this within an exception thereto. If we had expected that this question would be raised again to-day, after it had been disposed of yesterday, we would have come prepared with authorities to submit.

Mr. Manager James B. Perkins of New York, said:

Mr. President, just a word. I did not again object to-day because the Senate yesterday, I must confess somewhat to my surprise, allowed a similar question to be answered. Doubtless it was that the legal question involved was not presented by me with the clearness with which it has now been stated by the Senator from North Dakota. The gentleman on the other side misstates the question and avoids the inquiry made by the Senator. It is not can Judge Swayne's intention be proved? His intention is a question that perhaps can be proved, but Judge Swayne's intention, no more than any other thing in Judge Swayne's behalf, can be proved by Judge Swayne's own statement.

It is offered to prove here, what? Judge Swayne's intention, by the fact that Judge Swayne said it was his intention. As the Senator from North Dakota properly says, it is an endeavor to prove something in behalf of the defendant by his own statement. There is the inherent vice of the question, and I think the failure perhaps to catch that point yesterday was the reason the ruling was made by the Senate.

Mr. Higgins replied:

Only a word in reply. The learned manager who would confine the evidence of intention to acts, when from the very great case in 3 Washington Report down it is the established law as to citizenship, as to residence, as to domicile, that they are each and every one of them made up of two articles—of intent and of action—that if you can not prove anything by words you are confined merely in your evidence to acts. That is not the law, with all due respect to my learned friend.

Mr. Manager Olmsted said:

I again call the attention of the Senate to the fact that this precise question was before the Senate of the United States in the impeachment trial of Andrew Johnson, where his counsel offered to prove, for the purpose of showing the intent of the President of the United States, his statements to other parties.

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There was then cited the celebrated English case of Hardy, reported in 24 State Trials, page 1096, where it was held by the House of Lords:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent"—

Mark the words—

"though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, etc."

Upon the citation of that authority and the argument of the case the United States Senate decided, by a vote of nearly 4 to 1, that such a statement made by the respondent could not be proved by the party to whom he made it.

Mr. Higgins said:

I have not had a chance to reply to that. I agree to that law, for that was not a case of residence, nor of domicile nor of citizenship. It was a case of ordinary criminal conduct, where the intent is inferred from the act. But the difference is laid down in the law, that residence is a mixed question of law and fact; that it is made up of action plus intent, and intent plus action, and therefore it is to be differentiated entirely from Hardy's case, and goes back to another class of authorities entirely.

The Presiding Officer said:

Shall the witness be permitted to answer the question. [Putting the question.] In the opinion of the Presiding Officer the "noes" have it. The "noes" have it, and the answer is excluded.

Later, on the same day,[51] Henry G. Swayne was sworn and examined by Mr. Higgins:

Q. Do you recall the time of the passage of the act of Congress curtailing the northern district of Florida?—A. Yes, sir.

Q. July 1894. Where were your father and family residing at that time?—A. St. Augustine, Fla.

Q. You were not there last year?—A. I was there at that time; that summer.

Q. State what you know as to any facts or acts of Judge Swayne with reference to making his residence at Pensacola.—A. Immediately after the passage of the act, or within a few days thereafter, he left the home in St. Augustine and went to Pensacola, declaring that he was——

Mr. Manager Perkins having interposed, Mr. Higgins said:

I offer to prove by this witness what the judge declared at the time; and I should like to know if the manager objects.

Mr. Manager PERKINS. We object. That is easily answered.

The PRESIDING OFFICER. The Presiding Officer understands that counsel propose to prove the declaration of Judge Swayne made at the time when he left his home in St. Augustine as to where he was going to make his home. * * * The Presiding Officer thinks that may be done. If any Senator desires, he will submit the question to the Senate. * * * This is a declaration made at the time he left his home in St. Augustine as to where he intended to take up his home on leaving the St. Augustine home. * * * If any Senator desires, the Presiding Officer will submit the question to the Senate. [A pause.] The Presiding Officer thinks it part of the res gestae. The Presiding Officer understands that the witness is about to testify to a statement made by Judge Swayne at the time he was giving up his home in St. Augustine; and that the Presiding Officer thinks the witness may state.

Mr. HIGGINS. Please proceed.

A. The statement in full which was made by Judge Swayne at the time, as I recollect it, was that the bill dividing the district or redistricting the State, whichever it was, had just passed Congress and been signed by the President, and that he would be compelled to make his residence within the boundaries of his district, and that he was going to go to Pensacola; and with that declaration he left St. Augustine that summer in the month of July. I was there, having gone down after my collegiate year was over, from Philadelphia, and I, with the other members of the family——

[51] Record, p. 3153.

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2240. By a majority of one the Senate, in the Johnson trial, sustained the Chief Justice's ruling that evidence as to respondent's declaration of intent, made at the time of the act, was admissible.—On April 13, 1868,[52] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Reverdy Johnson, a Senator from Maryland, asked for the recall as a witness of Gen. William T. Sherman, and General Sherman having taken the stand, Mr. Johnson proposed in writing this question:

When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?

Mr. Manager John A. Bingham objected to the question as incompetent, in accordance with the rulings of the Senate heretofore made.

The question being taken without argument, "Is the question admissible?" there appeared yeas 26, nays 22. So the question was admitted.

And the witness replied, "Yes."

Thereupon Mr. Reverdy Johnson proposed this question:

If he did, state what he said his purpose was.

Mr. Manager Bingham objected to the question, since it was incompetent for the accused to make his own declarations evidence for himself.

The Chief Justice[53] said:

The Chief Justice has already said upon a former occasion that he thinks that, for the purpose of proving the intent, this question is admissible; and he thinks also, that it comes within the rule which has been adopted by the Senate as a guide for its own action. This is not an ordinary court, but it is a court composed largely of lawyers and gentlemen of great experience in the business transactions of life, and they are quite competent to determine upon the effect of any evidence which may be submitted to them; and the Chief Justice thought that the rule which the Senate adopted for itself was founded on this fact; and in accordance with that rule, by which he determined the question submitted on Saturday, he now determines this question in the same way.

Messrs. Managers Bingham and Butler asked if this was not the same question ruled on Saturday, April 11.

The Chief Justice said:

The Chief Justice does not say that. What he does say is, that it is a question of the same general import, to show the intent of the President during these transactions. The Secretary will read the question again.

* * * * * * *

Senators, you who are of opinion that the question just read, "If he did, state what he said his purpose was," is admissible, and should be put to the witness, will, as your names are called, answer yea; those of a contrary opinion, nay. The Secretary will call the roll.

And the vote being taken, there appeared yeas 26, nays 25. So the question was admitted.

2241. Declarations of the respondent made during the act were admitted to rebut evidence of other declarations, made also during the act, but on a different day.

Instance wherein, during the introduction of evidence, an objection withdrawn by a manager was renewed by a Senator.

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[52] Second session Fortieth Congress, Senate Journal, pp. 893, 894; Globe supplement, pp. 169–173.

[53] Salmon P. Chase, of Ohio, Chief Justice.

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On February 15, 1805,[54] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, William Marshall was sworn as a witness on behalf of the respondent. During the examination of this witness Mr. Robert G. Harper, counsel for the respondent, asked a question to which objection was made by Mr. Joseph H. Nicholson, of Maryland, one of the managers.

After consultation Mr. Nicholson withdrew the objection, whereupon it was renewed by a member of the court.

Thereupon Mr. Harper, in behalf of the respondent, made the following motion:

Testimony on the part of the prosecution, tending to show from the declarations of the respondent that he had a corrupt intention to pack a jury for the trial of Callender, having been given, he offers in evidence other declarations of his, made during the proceedings, but on a different day, for the purpose of rebutting the former testimony, and of showing that his intentions, in that respect, were pure and even favorable to Mr. Callender.

Thereupon the President [55] said:

This evidence is consented to by the managers. The question is, "Shall it be, on such consent, examined by the court?"

And the question was determined in the affirmative, yeas 32, nays 2.

2242. In the Johnson trial the Senate sustained the Chief Justice in admitting as showing intent, on the principle of res gestae, evidence of respondent's verbal statement of the act to his Cabinet.—On April 17, 1868,[56] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gideon Welles, Secretary of the Navy, was sworn and examined as a witness by counsel for the respondent, and testified that he attended a meeting of the Cabinet on the afternoon of February 21 last. At this meeting, after the departmental business had been concluded, and as they were about to separate, the President made a statement.

Objection as to testimony of what the President said being intimated by the managers for the House of Representatives, Mr. William M. Evarts, of counsel for the respondent, made this offer of proof:

We offer to prove that on this occasion the President communicated to Mr. Welles and the other members of his Cabinet, before the meeting broke up, that he had removed Mr. Stanton and appointed General Thomas Secretary of War ad interim, and that upon the inquiry by Mr. Welles whether General Thomas was in possession of the office the President replied that he was; and upon further question of Mr. Welles whether Mr. Stanton acquiesced the President replied that he did; all that he required was time to remove his papers.

Mr. Manager Benjamin F. Butler at once objected.

Mr. President and Senators, as it seems to us, this does not come within any possible proposition of law to render it admissible. It is now made certain that this act was done without any consultation of his Cabinet by the President, whether that consultation was to be held verbally, as I think is against the constitutional provision, or whether the theory is to be adopted that the President has a right to consult with his Cabinet upon questions of his conduct.

Mr. Manager Butler proceeded to discuss the constitution and functions of the President's Cabinet, holding that strictly the President might only require written opinions of the heads of Departments.

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[54] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 251.
[55] Aaron Burr, of New York, Vice-President, and President of the Senate.
[56] Second session Fortieth Congress, Senate Journal, pp. 908, 909; Globe Supplement, pp. 222–225.

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Continuing as to the competency of the evidence, Mr. Butler said:

Now, the question is, after he has done the act, after he has thought it was successful, after he thought Mr. Stanton had yielded the office, can he, by his narration of what he had done and what he intended to do, shield himself before a tribunal from the consequences of that act? It is not exactly the same question which you decided yesterday by almost unexampled unanimity in the case of Mr. Perrin and Mr. Selye, the Member of Congress, on that same day, a few minutes earlier or a few minutes later? They offered in evidence here what he told Mr. Perrin and what he told Mr. Selye; they complicated it by the fact that Mr. Selye was a Member of Congress; and the Senate decided by a vote which indicated a very great strength of opinion that that sort of narration could not be put in.

Now, is this any more than narration? It was not to take the advice of Mr. Welles as to what he should do in the future, or upon any question; it was mere information given to Mr. Welles or to the other members of the Cabinet after they had separated in their Cabinet consultation, and while they were meeting together as any other citizens might meet. It would be as if, after you adjourned here, some question should be attempted to be put in as to the action of the Senate because the Senators had not left the room. Again, I say it was simply a narration, and that narration of his intent and purposes, his thoughts, expectations, and feelings.

I do not propose to argue it further until I hear something showing why we are to distinguish this case from the case of Mr. Perrin, on which you voted yesterday. Mr. Perrin tells you that on the 22d he waited for the Cabinet meeting to break up, and as soon as it broke up he went in with Mr. Selye, and then the President undertook to tell him. You said that was no evidence. Now, when he undertook to tell Mr. Welles is that any more evidence? I can not distinguish the cases, and I desire to hear them distinguished before I attempt an answer to any such distinction.

* * * * * * *

It is said that it is an official act. I had supposed up to this moment—aye, and I suppose now—that there is no act that can be called an official act of an officer which is not an act required by some law or some duty imposed upon that officer. Am I right in my ideas of what is an official act? It is not every volunteer act by an officer that is official. Frequently such acts are officious, not official. An official act, allow me to say, is an act which the law requires, or a duty which is enjoined upon the officer by some law, or some regulation, or in some manner as a duty. Will the learned counsel tell the Senate what constitutional provision, what statute provision, what practice of the Government requires the President at any time to inform his Cabinet or any member of them whatever that he has removed one man and put in another, and that that other man is in office? If there is any such law, it has escaped my attention. I am not aware of it.

* * * * * * *

Now, then, what is offered? Stanton has been removed by the act of the President; and thereupon, without asking advice—because that is expressly waived by the learned counsel last addressing us—not as a matter of advice, the President gives information. Now, how can that information be evidence? How can he make it evidence? The information is required by no law, was given for no purpose to carry out any official duty, was the mere narration of what the President chose to narrate at that time.

Mr. Evarts, in behalf of the respondent argued:

Now, then, it stands thus: That at a Cabinet meeting held on Friday, the 21st of February, when the routine business of the different Departments was over, and when it was in order for the President to communicate to his Cabinet whatever he desired to lay before them, the President did communicate this fact of the removal of Mr. Stanton and the appointment of General Thomas ad interim, and that thereupon his Cabinet officers inquired as to the posture in which the matter stood, and as to the situation of the office and of the conduct of the retiring officer. Here we get rid of the suggestion that it is a mere communication to a casual visitor which made the staple of the argument yesterday against the introduction of the evidence as to the conversation with Mr. Perrin and Mr. Selye. We now present you the communication made by the President of the United States while this act was in the very process of execution, while it was yet, as we say in law, in fieri, being done.

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It being in fieri, the President communicates the fact how this public transaction has been performed and is going on, and we are entitled to that as a part of the res gestae in its sense of a governmental act, with all the benefit that can come from it in any future consideration you are to give to the matter as bearing upon the merits and the guilt or innocence of the President in the premises. It bears, as we say, directly upon the question whether there had been any other purpose than the placing of the office in a proper condition for the public service according to the announcement of the President as his intention when he conversed with General Sherman in the January preceding; and it negatives all idea that at the time that General Thomas to Mr. Wilkeson or to the Dakota Delegate, Mr. Burleigh, was saying or suggesting anything of force, the President was the author of, or was responsible for, his statements. The truth is, it presents the transaction as wholly and completely an orderly and peaceful movement of the President of the United States, as, in fact, it was, and no evidence has been given to the contrary, of any occurrence disturbing that peaceful order and as the situation in which its completion left the matter in the mind of the President up to that point of time.

Mr. Benjamin R. Curtis, also of counsel for the respondent, added:

We are anxious that this testimony now offered should be distinguished in the apprehension of the Senate, as it is in our own, from an offer of advice, or from the giving of advice by the Cabinet to the President. We do not place our application for the admission of this evidence upon the ground that it is an act of giving advice by his councilors to the President. We place it upon the ground that this was an official act done by the President himself when he made a communication to his councilors concerning this change which he had made in one of their number; that that was strictly and purely an official act of the President, done in a proper manner, the subject-matter of which each of those councilors was interested in in his public capacity, and which it was proper or the President to make known to them at the earliest moment when he could make such a communication.

Mr. Curtis further reviewed the constitutional history of the Cabinet to show that the practice was for the President to rely on the Cabinet, both for consultation and decision, finally saying as to his remarks in making this review:

They are pertinent to the question now under consideration, for they go to show that under the Constitution and laws of the United States as practiced on by every President, including General Washington and Mr. Adams, Cabinet ministers were assembled by them as a council for the purposes of consultation and decision, and of course, when thus assembled, a communication made to them by the President of the United States concerning an important official act which was then in fieri, in process of being executed and not yet completed is itself an official act of the President, and we submit to the Senate that we have a right to prove it in that character.

The Chief Justice [57a] said at the conclusion of the arguments:

Senators, the Chief Justice thinks that this evidence is admissible. It has, as he thinks, important relation to the res gestæ, the very transaction which forms the basis of several of the articles of impeachment, and he thinks it also entirely proper to take into consideration in forming an enlightened judgment upon the intent of the President. He will put the question to the Senate if any Senator desires it.

Mr. Aaron H. Cragin, a Senator from New Hampshire, asked that the evidence excluded in the case of Witness Perrin [57b] be read. This having been done, Mr. Jacob M. Howard, a Senator from Michigan, proposed this question:

In what way does the evidence the counsel for the accused now offer meet any of the allegations contained in the impeachment?

How does it affect the gravamen of any one of the charges?

[57a] Salmon P. Chase, of Ohio, Chief Justice.

[57b] See sec. 2244 of this work.

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To this Mr. Evarts responded:

The Senators will perceive that this question anticipates a very extensive field of inquiry—first as to what the gravamen of all these articles is, and, secondly, as to what shall finally be determined to be the limits of law and fact that properly press upon the issues here; but it is enough to say, probably, as we have every desire to meet the question with all the intelligence that we can command, at the present stage of the matter, without going into these anticipations, that it bears upon the question of the intent with which this act was done, as being a qualification of the act in the President's mind at the time he announces it as complete. It bears on the conspiracy articles and it bears upon the eleventh article, even if it should be held that the earlier articles, upon the mere removal of Mr. Stanton and the appointment of General Thomas, are to cease in the point of their inquiry, intent, and all with the consummation of the acts.

The Chief Justice thereupon said:

The Chief Justice will restate to the Senate the question as it presents itself to his mind. The question yesterday had reference to the intention of the President, not in relation to the removal of Mr. Stanton, as the Chief Justice understood it, but in relation to the immediate appointment of a successor by sending in the nomination of Mr. Ewing. The question to-day relates to the intention of the President in the removal of Mr. Stanton; and it relates to a communication made to his Cabinet after the departmental business had closed, but before the Cabinet had separated. The Chief Justice is clearly of opinion that this is a part of the transaction and that it is entirely proper to take this evidence into consideration as showing the intent of the President in his acts. The Secretary will call the roll.

The question being taken, there appeared, yeas 26, nays 23. So the evidence was admitted.

2243. It was decided in the Chase trial that declarations of the respondent after the act might not be admitted to show the intent.—On February 15, 1805,[58] in the high court of impeachment, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, asked of Edward J. Coale, the witness under examination, the following question:

At the time Judge Chase desired you to make the copy in your hand, did he, or did he not, explain to you his reasons or motives for drawing up the paper from which this copy was made? If yes, what were they?

Mr. Joseph H. Nicholson, of Maryland, one of the managers, objected to the question.

At the suggestion of the President[59] the question was reduced to writing.

Mr. Hopkinson said he thought such questions perfectly legal when they went to show the intention of the accused. "We have heard," said he, "much of the quo animo, and it is perfectly clear that the intention constitutes the guilt of the offense."

Mr. Nicholson said:

The quo animo is to be collected from the acts of the party. The evidence of his declaration may be shown to prove the quo animo. But I do not consider it to be correct that Judge Chase shall be permitted to give in evidence declarations made at any other time than that when we have stated he made them; otherwise it will always lay in the discretion of the party accused to state declarations made at another time by him for the purpose of justifying any acts he may have committed.

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[58] Second session Eighth Congress, Senate Impeachment Journal, p. 519; Annals, pp. 242–243.

[59] Aaron Burr, of New York, Vice-President and President of the Senate.

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Mr. Luther Martin, counsel for the respondent, said he had ever considered the declaration of the party at the time he was charged with committing a criminal act as competent evidence to show his innocence.

Mr. Nicholson said there was no doubt of it, but that he was not charged with drawing out the paper as a criminal act. Any declaration made by Judge Chase at the time he delivered the opinion of the court may be given in evidence, but any other declarations have nothing to do with the case.

The President said:

Where was the conversation between the judge and yourself?

Mr. COALE. At the judge's lodgings.

The question was then taken—

Is it competent for the counsel for the respondent to put said question to the witness?

And it was determined in the negative, yeas 9, nays 25.

2244. In the Johnson trial the Senate ruled out evidence as to respondent's declarations of intent made after the act.

Comment of the Chief Justice on the Senate's decisions on evidence as to respondent's declarations at or near the time of the act.

On April 16, 1868,[60] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Edwin O. Perrin was sworn and examined by counsel on behalf of the respondent. Mr. Perrin testified to an interview which he had with the President in company with Mr. Selye, a Congressman, on the evening of February 21, 1868.

Mr. William M. Evarts, of counsel for the respondent, asked:

Did you then hear from the President of the removal of Mr. Stanton?

Mr. Manager Benjamin F. Butler at once entered an objection, which caused the counsel for respondent to submit in writing the following:

We offer to prove that the President then stated that he had issued an order for the removal of Mr. Stanton and the employment of General Thomas to perform the duties ad interim; that thereupon Mr. Perrin said: "Supposing Mr. Stanton should oppose the order." The President replied: "There is no danger of that, for General Thomas is already in the office." He then added: "It is only a temporary arrangement; I shall send in to the Senate at once a good name for the office."

Mr. Manager Butler said:

I find it, Mr. President and Senators, my duty to object to this. There is no end to declarations of this sort. The admission of those to Sherman and to Thomas was advocated on the ground that the office was tendered to them and that it was a part of the res gestæ. This is mere narration, mere statement of what he had done and what he intended to do. It never was evidence and never will be evidence in any organized court, so far as any experience in court has taught me. I do not see why you limit it. If Mr. Perrin, who says he has heretofore been on the stump, can go there and ask him questions, and the answers can be received, why not anybody else? If Mr. Selye could go there, why not everybody else? Why could he not make declarations to every man, aye, and woman, too, and bring them in here, as to what he intended to do and what he had done to instruct the Senate of the United States in their duties sitting as a high court of impeachment?

[60] Second session Fortieth Congress, Senate Journal, pp. 905, 906; Globe supplement, pp. 206–208.

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And Mr. Manager James F. Wilson added:

Mr. President, as this objection is outside of any former ruling of the Senate, and is perfectly within the rule laid down in Hardy's case, I wish to call the attention of the Senate to that rule again, not for the purpose of entering upon any considerable discussion, but to leave this objection under that rule to the decision of the Senate:

"Nothing is so clear as that all declarations which apply to facts, and even apply to the particular case that is charged, though the intent should make a part of that charge, are evidence against a prisoner, and are not evidence for him, because the presumption upon which declarations are evidence is that no man would declare anything against himself unless it were true; but every man, if he was in a difficulty, or in the view to any difficulty, would make declarations for himself." (24 State Trials, p. 1096.)

If this offer of proof does not come perfectly within that rule, then I never met a case within my experience that would come within its provisions. I leave this objection to the decision of the Senate upon that rule.

In behalf of the admission of the evidence Mr. Evarts said:

It will be observed that this was an interview between the President of the United States and a Member of Congress, one of "the grand inquest of the nation," holding, therefore, an official duty and having access, by reason of his official privilege, to the person of the President; that at this hour of the day the President was in the attitude of supposing, upon the report of General Thomas, that Mr. Stanton was ready to yield the office, desiring only the time necessary to accommodate his private convenience, and that he then stated to these gentlemen: "I have removed Mr. Stanton and appointed General Thomas ad interim," which was their first intelligence of the occurrence; that upon the suggestion, "Will there not be trouble or difficulty?" the President answered (showing thus the bearing on any question of threats or purpose of force as to be imputed to him from the declarations that General Thomas was making at about the same hour to Mr. Wilkeson) that there was no occasion for or "no danger of that, as General Thomas was already in." Then, as to the motive or purpose entertained by the President at the time of this act of providing anybody that should control the War Department or the military appropriations, or by combination with the Treasury Department suck the public funds, or to have, though I regret to repeat the words as used by the honorable manager, a tool or a slave to carry on the office to the detriment of the public service, we propose to show that at the very moment he asserts, "This is but a temporary arrangement; I shall at once send in a good name for the office to the Senate."

Now, you will perceive that this bears upon the President's condition of purpose in this matter, both in respect to any force as threatened or suggested by anybody else being imputable to him at this time, and upon the question of whether this appointment of General Thomas had any other purpose than what appeared upon its face, a nominal appointment, to raise the question of whether Mr. Stanton would retire or not, and determined, as it seemed to be for the moment, by the acquiescence of Mr. Stanton, was then only to be maintained until a name was sent in to the Senate, as by proof hitherto given we have shown was done on the following day before 1 o'clock.

At the conclusion of argument the Chief Justice [61] said:

Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decision as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversations with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it; but he will submit directly to the Senate the question whether it is admissible or not.

The question being taken on the admission of the testimony, there appeared, yeas 9, nays 37. So the evidence was excluded.

2245. In the Johnson trial the Chief Justice ruled that an official message transmitted after the act was not admissible as evidence

[61] Salmon P. Chase, of Ohio, Chief Justice.

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to show intent.—On April 15, 1868,[62] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, during the presentation of evidence on behalf of the respondent, Mr. Benjamin R. Curtis, of counsel, offered a message of the President to the Senate of the United States, bearing date February 24, 1868.

Mr. Benjamin F. Butler, of the managers for the House of Representatives, objected to the admission of the message as evidence, since it was virtually a declaration of the President after he was impeached, and that could not be evidence Mr. Butler stated that the record as to the impeachment was:

> That on the 21st of February a resolution was proposed for impeachment and referred to a committee; on the 22d the committee reported, and that was debated through the 22d and into Monday, the 24th, and the actual vote was taken on Monday, the 24th.

Arguing in support of the objection, Mr. John A. Bingham, of Ohio, one of the managers, said as to the message:

> Is it any more than a volunteer declaration of the criminal, after the fact, in his own behalf? Does it alter the case in law? Does it alter the case in the reason or judgment of any man living, either within the Senate or out of the Senate, that he chose to put his declaration in his own defense in writing? The law makes no such distinctions. I undertake to assert it here, regardless of any attempt to contradict my statement, that there is no law that enables any accused criminal, after the fact, to make declarations, either orally or in writing, either by message to the Senate or a speech to a mob, to acquit himself or to affect in any manner his criminality before the tribunals of justice, or to make evidence which shall be admitted under any form of law upon his own motion to justify his own criminal conduct.
>
> I do not hesitate to say that every authority which the gentlemen can bring into court regulating the rule of evidence in procedures of this sort is directly against the proposition, and for the simple reason that it is a written declaration made by the accussed voluntarily, after the fact, in his own behalf.

Mr. William M. Evarts, of counsel for the President, argued that as the managers had been permitted to put in evidence a resolution of the Senate passed on February 21, and declaring that the President had exceeded his powers, the counsel for the respondent should be permitted to put in the message, which was an answer to that resolution. Mr. Evarts said:

> Now, if the crime [the removal of Secretary Stanton] was completed on the 21st of February, which is not only the whole basis of this argument of the learned managers, but of every other argument upon the evidence that I have had the honor of hearing from them, I should like to know what application or relevancy the resolution passed by the Senate on the 21st of February, after the act of the President had been completed, and after that act had been communicated to the Senate, has on the issue of whether that act was right or wrong? And if the fact that it is an expression of opinion relieves the testimony from the possibility of admission, what was this but an expression of the opinion of the Senate of the United States in the form of a resolution regarding a past act of the President? There could be, then, no single principle of the law of evidence upon which this fact put in proof in behalf of the managers could be admitted, except as a communication from this branch of the Government to the President of the United States of its own opinion concerning the legality of his action; and in the same line and in immediate reply the President communicates to the Senate of the United States, openly and in a proper message, his opinions concerning the legality of the act. What would be thought of the Government that, in a criminal prosecution, by way of inculpating a prisoner, should give in evidence what a magistrate or a sheriff had said to him concerning the crime imputed, and then shut the mouth of the

[62] Second session Fortieth Congress, Senate Journal, p. 898; Globe supplement, pp. 175–178.

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prisoner as to what he had said then and there in reply? Why, the only possibility, the only argument for affecting the prisoner with criminality for what had been said to him, was that, unreplied to, it might be construed into admission or submission; and to say that the prisoner when told, "You stole that watch," could not give in evidence his reply, "it was my own watch, and I took it because it was mine," is precisely the same proposition that is being applied here by the learned managers to this communication back and forth between the Senate and the President.

The arguments being concluded, the Chief Justice [63] said:

There is, perhaps, Senators, no branch of the law in which it is more difficult to lay down precise rules than that which relates to evidence of the intent with which an act is done. In the present case it appears that the Senate, on the 21st of February, passed a resolution, which I will take the liberty of reading:

"Whereas the Senate have received and considered the communication of the President stating that he has removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

"*Resolved by the Senate of the United States*, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and to designate any other officer to perform the duties of the office ad interim."

That resolution was adopted on the 21st of February, and was served, as the evidence before you shows, on the evening of the same day. The message which is now proposed to be introduced was sent to the Senate on the 24th day of February. It does not appear to the Chief Justice that the resolution of the Senate called for an answer, or that there was any call upon the President to answer from the Senate itself; and therefore he must regard the message which was sent to the Senate on the 24th of February as a vindication of the President's act addressed by him to the Senate; and it does not appear to the Chief Justice to come within any of the rules which have been applied to the introduction of evidence upon this trial. He will, however, take pleasure in submitting the question to the Senate if any Senator desires it. [After a pause.] If no Senator desires that the question be submitted to the Senate, the Chief Justice rules the evidence to be inadmissible.

2246. The Chief Justice was sustained in admitting during the Johnson trial evidence of an act after the fact as showing intent. Evidence of declarations of respondent after the fact was excluded in the Johnson trial, although related to an act admitted in proof to show intent.

On April 16, 1868,[64] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Walter S. Cox, an attorney at law residing in the District of Columbia, was called as a witness on behalf of the respondent. The witness having stated that he was connected professionally with the case of Gen. Lorenzo Thomas, who had been arrested on a warrant based on an affidavit of Edwin M. Stanton, Secretary of War, Mr. Benjamin R. Curtis, of counsel for the respondent, asked:

When and under what circumstances did your connection with that matter begin?

To this question Mr. Manager Benjamin F. Butler objected on the ground of irrelevancy.

The Chief Justice [65] said:

The Chief Justice sees no objection to the question as an introductory question, but will submit it to the Senate if it is desired. [After a pause, to the witness.] You can answer the question.

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[63] Salmon P. Chase, of Ohio, Chief Justice.

[64] Second session Fortieth Congress, Senate Journal, p. 903; Globe supplement pp. 197–200.

[65] Salmon P. Chase, of Ohio, Chief Justice.

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The witness stated that he was sent for on February 22, and went to the President's House, where he saw the President about 5 p.m. Witness was about to relate what the President said, when Mr. Manager Butler interposed an objection.

This produced from the counsel for the respondent the following written offer:

We offer to prove that Mr. Cox was employed professionally by the President, in the presence of General Thomas, to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose; and we shall expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment.

Mr. Manager Butler at once objected.

In the course of the arguments Mr. Manager James F. Wilson thus stated the substance of the objection:

Now, I submit to this honorable body that no act, no declaration of the President made after the fact, can be introduced for the purpose of explaining the intent with which he acted. And upon this question of intent let me direct your minds to this consideration—the issuing of the orders referred to constitute the body of the crime with which the President stands charged. Did he purposely and willfully issue an order to remove the Secretary of War? Did he purposely and willfully issue an order appointing Lorenzo Thomas Secretary of War ad interim? If he did thus issue the orders, the law raises the presumption of guilty intent, and no act done by the President after these orders were issued can be introduced for the purpose of rebutting that intent. The orders themselves were in violation of the terms of the tenure of office act. Being in violation of that act, they constitute an offense under and by virtue its provisions, and the offense thus being established must stand upon the intent which controlled the action of the President at the time that he issued the orders. If, after this subject was introduced into the House of Representatives, the President became alarmed at the state of affairs, and concluded that it was best to attempt by some means to secure a decision of the court upon the question of the constitutionality or unconstitutionality of the tenure of office act, it can not avail him in this case. We are inquiring as to the intent which controlled and directed the action of the President at the time the act was done; and if we succeed in establishing that intent, either by proof or by presumption of law, no subsequent act can interfere with it or remove from him the responsibiltiy which the law places upon him because of the act done.

Mr. William M. Evarts, of counsel for the respondent, argued:

Mr. Chief Justice and Senators, we have here the oft-repeated argument that the crime against the act of Congress was complete by the papers drawn and delivered by the President; that the law presumes that those papers were made with the intent that appears on their face, which, it is alleged, is a violation of that act; and as that would be enough in an indictment against the President of the United States to affect him with a punishment, in the discretion of the judge, of six cents fine, so by peremptory necessity it becomes in this court a complete and perfect crime under the Constitution, which must require his removal from office, and that anything beyond the intent that the papers should accomplish what they tend to accomplish is not the subject of inquiry here. Well, it is the subject of imputation in the articles; it is the subject of the imputation in the arguments; it is the subject, and the only subject, that gives gravity to this trial, that there was a purpose of injury to the public interest and to the public safety in this proceeding.

Now, we seek to put this prosecution in its proper place on this point, and to show that our intent was no violence, no interruption of the public service, no seizure of the military appropriations, nothing but the purpose by this movement either to procure Mr. Stanton's retirement, as was desired, or to have the necessary footing for judicial proceedings. If this evidence is excluded, then, when you come to the summing up of this cause, you must take the crime of the dimensions and of the completeness that is here avowed, and I shall be entitled before

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this court and before this country to treat this accusation as if the article had read that he issued that order for Mr. Stanton's retirement, and that direction to General Thomas to take charge ad interim, with the intent and purpose of raising a case for the decision of the Supreme Court of the United States between the Constitution and the act of Congress; and if such an article had been produced by the House of Representatives and submitted to the Senate it would have been a laughingstock of the whole country.

The gentlemen shall not make their arguments and escape from them at the same breath. I offer this evidence to prove that the whole purpose and intent of the President of the United States in his action in reference to the occupancy of the office of Secretary of War had this extent and no more—to obtain a peaceable delivery of that trust from one holding it at pleasure to the Chief Executive, or, in the absence of that peaceable retirement, to have a case for the decision of the Supreme Court of the United States; and if the evidence is excluded you must treat every one of these articles as if the intent were limited to an open averment in the articles themselves that the intent of the President was such as I propose to prove it.

At the conclusion of the arguments, the Chief Justice [66] said:

Senators, the counsel for the President offer to prove that the witness, Mr. Cox, was employed professionally by the President in the presence of General Thomas to take such legal proceedings in the case that had been commenced against General Thomas as would be effectual to raise judicially the question of Mr. Stanton's legal right to continue to hold the office of Secretary for the Department of War against the authority of the President, and also in reference to obtaining a writ of quo warranto for the same purpose, and they state that they expect to follow up this proof by evidence of what was done by the witness in pursuance of the above employment. The first article of impeachment, which may, perhaps, for this purpose, be taken as a sample of the rest relating to the same subject, after charging that "Andrew Johnson, President of the United States," in violation of the Constitution and laws, issued the order which has been so frequently read for the removal of Mr. Stanton, proceeds:

"Which order was unlawfully issued with intent then and there to violate the act entitled 'An act regulating the tenure of certain civil offices,'" etc.

The article charges, first, that the act was done unlawfully, and then it charges that it was done with intent to accomplish a certain result. That intent the President denies, and it is to establish that denial by proof that the Chief Justice understands this evidence now to be offered. It is evidence of an attempt to employ counsel by the President in the presence of General Thomas. It is the evidence so far of a fact; and it may be evidence also of declarations connected with that fact. This fact and these declarations, which the Chief Justice understands to be in the nature of facts, he thinks are admissible in evidence. The Senate has already, upon a former occasion, decided by a solemn vote that evidence of the declarations by the President to General Thomas and by General Thomas to the President, after this order was sent to Mr. Stanton, were admissible in evidence. It has also admitted evidence of the same effect, on the 22d, offered by the honorable managers. It seems to me that the evidence now offered comes within the principle of those decisions; and, as the Chief Justice has already had occasion to say, he thinks that the principle of those decisions is right, and that they are decisions which are proper to be made by the Senate sitting in its high capacity as a court of impeachment, and composed, as it is, of lawyers and gentlemen thoroughly acquainted with the business transactions of life and entirely competent to judge of the weight of any evidence which may be submitted. He therefore holds the evidence to be admissible, but will submit the question to the Senate, if desired.

Mr. Charles D. Drake, of Missouri, having asked for a vote, on the question "shall the proof offered be admitted," there appeared yeas 29, nays 21. So the proof was admitted.

The witness then testified as to directions which he received from the President to institute legal proceedings to test General Thomas's right to the office of Secretary of War.

[66] Salmon P. Chase, of Ohio, Chief Justice.

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Mr. Curtis, of counsel for the respondent, then asked:

What did you do toward getting out a writ of habeas corpus under the employment of the President?

Mr. Manager Butler having objected, the question was referred to the Senate and decided to be admissible; yeas 27, nays 23.[67]

The witness proceeded to describe his efforts in court, saying finally:

But the counsel who represented the Government, Messrs. Carpenter and Riddle, applied to the judge then for a postponement of the examination——

Mr. Manager Butler having questioned this statement, the Chief Justice said:[68]

It is an account of the general transaction, as the Chief Justice conceives, and comes within the rule. The witness will proceed.

The witness, having related how General Thomas was discharged from court, proceeded:

Immediately after that I went, in company with the counsel he had employed, Mr. Merrick, to the President's House, and reported our proceedings and the results to the President. He then urged us to proceed——

Here Mr. Manager Butler interposed an objection, and Mr. Manager John A. Bingham called attention to the fact that this was asking for the President's declaration on February 26, two days after his impeachment.

Mr. Evarts, of counsel for the respondent, explained:

If it is to turn on that point, which has not been discussed in immediate reference to this question, we desire to be heard. The offer which the Chief Justice and Senators will remember was read, and upon which the vote of the Senate was taken for admission, included the efforts to have a habeas corpus proceeding taken, and also the efforts to have a quo warranto. The reasons why, and the time at which, and the circumstances under which, the habeas corpus effort was made, and its termination, have been given. Thereupon the efforts were attempted at the quo warranto. It is in reference to that that the President gave these instructions. We suppose it is covered by the ruling already made.

The Chief Justice said:[69]

The Chief Justice may have misapprehended the intention of the Senate; but he understands their ruling to be in substance this: That acts in respect to the attempt and intention of the President to obtain a legal decision, commencing on the 22d of February, may be pursued to the legitimate termination of that particular transaction; and, therefore, the Senate has ruled that Mr. Cox, the witness, may go on and testify until that particular transaction came to a close. Now, the offer is to prove conversations with the President after the termination of that effort in the supreme court of the District of Columbia. The Chief Justice does not think that is within the intent of the previous ruling; but he will submit the question to the Senate, Senators, you who are of the opinion that this testimony should be received will please say "aye;" those of the contrary opinion, "no." [Putting the question.] The question is determined in the negative. The evidence is not received.

Thereupon Mr. Curtis propounded this question:

After you had reported to the President the result of your efforts to obtain a writ of habeas corpus, did you do any act in pursuance of the original instructions you had received from the President on Saturday, to test the right of Mr. Stanton to continue in the office? And if so, state what the acts were.

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[67] Globe supplement, p. 201; Senate Journal, p. 904.
[68] Globe supplement, p. 202.
[69] Senate Journal, p. 904; Globe supplement, p. 202.

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The Chief Justice at once intimated that under the last vote of the Senate this question was inadmissible; but Mr. John Sherman, a Senator from Ohio, asked that the fifth article of impeachment be read:

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Counsel for the respondent stated that the question had reference to this article.

The Chief Justice, having had the original offer of proof on the part of counsel for respondent read, said:

The discussion and the ruling of the Chief Justice in respect to that question was in reference to the first article of the impeachment. Nothing had been said about the fifth article in the discussion, so far as the Chief Justice recollects. The question is now asked with reference to the fifth article and the intent alleged in that article to conspire. The Chief Justice thinks it is admissible with that view under the ruling upon the first offer. He will, however, put the question to the Senate if any Senator desires it.

Mr. John Conness, a Senator from California, having asked for a vote, there appeared in favor of admitting the question 27 yeas, and against it 23 nays.[70] So the question was admitted.

2247. The Chief Justice admitted during the Johnson trial as showing intent a question as to action by the respondent, although taken after impeachment.—On April 16, 1868,[71] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Richard T. Merrick, attorney at law, was called as a witness on behalf of the respondent. Witness testified that he had been counsel for Gen. Lorenzo Thomas when the latter was arrested on complaint of Edwin M. Stanton, Secretary of War, at the time of the President's attempt to remove Mr. Stanton and place General Thomas in the office; and that after the action of the chief justice of the supreme court of the District in discharging General Thomas, he saw the President and communicated to him what had transpired.

Then Mr. Benjamin R. Curtis, of counsel for the respondent, proposed a question which, after objection, was presented in an offer of proof:

We offer to prove that about the hour of 12 noon, on the 22d of February, upon the first communication to the President of the situation of General Thomas's case, the President or the Attorney-General in his presence gave the attorneys certain directions as to obtaining a writ of habeas corpus for the purpose of testing judicially the right of Mr. Stanton to continue to hold the office of Secretary of War against the authority of the President.

Mr. Manager Benjamin F. Butler objected that the witness had been General Thomas's counsel and had not been employed by the

[70] Senate Journal, pp. 904, 905; Globe supplement, pp. 202, 203.
[71] Second session Fortieth Congress, Senate Journal, p. 905; Globe supplement, p. 205.

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President. Therefore this witness's testimony could not be considered evidence of the President's acts or declarations after impeachment.

The Chief Justice [72] said:

The Chief Justice thinks this evidence admissible within the rule already determined by the Senate. He will submit the question to the Senate if any Senator desires it. [After a pause.] The witness may answer the question.

Mr. Curtis then proposed this question:

What, if anything, did you and Mr. Cox do in reference to accomplishing the result you have spoken of?

Mr. Manager Butler having objected, the Chief Justice said:

The Chief Justice thinks it is competent, but he will put the question to the Senate if any Senator desires it. [After a pause, to the witness.] Answer the question.

2248. In impeachment trials witnesses are ordinarily required to state facts, not opinions.

In the Johnson trial a witness was not permitted, as a matter of proof of intent, to state that he had formed and communicated an opinion to respondent.

On February 11, 1805,[73] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, and while one Henry Tilghman was under examination, Mr. John Randolph, jr., of Virginia, one of the managers on behalf of the House of Representatives, proposed this question:

You say that when the written opinion of the court was thrown on the table, it produced considerable agitation among the gentlemen of the bar. What did you conceive to be the cause of that agitation?

Mr. Philip B. Key, counsel for the respondent, objected.

The President [74] having required the question to be reduced to writing it was read by the Secretary.

Thereupon Mr. James A. Bayard, of Delaware, a Senator, moved that the Senate should withdraw. This motion was then disagreed to.

The question was then put: "Is it competent for the managers to put the said question to the witness?"

It was determined in the negative, yeas 0, nays 34.

2249. On February 12, 1805,[75] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, George Hay, being under examination, the following occurred:

The Witness. Finding that the judge had made up his mind on that subject, and that the law of Virginia was not considered as obligatory, I had no idea of making any motion to the court founded on the doctrine which he had thus denounced. My opinion before, at that time, and at the present time, the opinion which I expressed officially on a late occasion, is, that where the laws of the United States do not otherwise require or provide——

Mr. Luther Martin, counsel for the respondent, said that he apprehended this testimony was of no kind of consequence.

The Witness. I was only about to state the reasons why nothing more was said on that subject, on a motion founded on it.

The President.[76] The Senate object to that sort of testimony. You will please to confine yourself as much as possible to facts.

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[72] Salmon P. Chase, of Ohio, Chief Justice.
[73] Second session Eighth Congress, Senate Impeachment Journal, p. 518, Annals, p. 180.
[74] Aaron Burr, of New York, President of the Senate and Vice-President of the United States.
[75] Second session Eighth Congress, Annals, p. 204.
[76] Aaron Burr, of New York, Vice-President and President of the Senate.

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2250. On April 13, 1868,[77] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was called as a witness on behalf of the President, and Mr. Henry Stanbery, of counsel for the President, asked this question:

After the restoration of Mr. Stanton to office, did you form an opinion whether the good of the service required a Secretary of War other than Mr. Stanton; and if so, did you communicate that opinion to the President?

Mr. Manager John A. Bingham at once objected to the question:

Mr. President and Senators, we desire to state very briefly to the Senate the ground upon which we object to this question. It is that matters of opinion are never admissible in judicial proceedings, but in certain exceptional cases, cases involving professional skill, etc.; it is not necessary that I should enumerate them. It is not to be supposed for a moment that there is a Member of the Senate who can entertain the opinion that a question of the kind now presented is competent under any possible circumstances in any tribunal of justice. It must occur to Senators that the ordinary tests of truth can not be applied to it at all; and in saying that, my remark has no relation at all to the truthfulness or veracity of the witness. There is nothing upon which the Senate could pronounce any judgment whatever. Are they to decide a question upon the opinions of forty or forty thousand men what might be for the good of the service? The question involved here is a violation of the laws of the land. It is a question of fact that is to be dealt with by witnesses; and it is a question of law and fact that is to be dealt with by the Senate.

Now, this matter of opinion may just as well be extended one step further, if it is to be allowed at all. After giving his opinion of what might be requisite to the public service, the next thing in order would be the witness's opinion as to the obligations of the law, the restrictions of the law, the prohibitions of the law. We can not suppose that the Senate will entertain such a question for a moment. It must occur to the Senate that by adopting such a rule as this it is impossible to see the limit of the inquiry or the end of the investigation. If it be competent for the witness to deliver this opinion, it is equally competent for forty thousand other men in this country to deliver their opinions to the Senate; and then, when is the inquiry to end? We object to it as utterly incompetent.

Mr. Stanbery explained the object of the question:

Mr. Chief Justice and Senators, if ever there was a case involving a question of intention, a question of conduct, a question as to acts which might be criminal or might be indifferent according to the intent of the party who committed them, this is one of that class. It is upon that question of intent (which the gentlemen know is vital to their case, which they know as well as we know they must make out by some proof or other) that a great deal of their testimony has been offered, whether successfully or not I leave the Senate to determine; but with that view much of their testimony has been offered and has been insisted upon. That is, it has been to show with what intent did the President remove Mr. Stanton. They say the intent was against the public good, in the way of usurpation, to get possession of that War Office and drive out a meritorious officer, and put a tool, or as they say in one of their statements a slave, in his place.

Upon that question of conduct, Senators, what now do we propose to offer to you? That the second officer of the Army—and we do not propose to stop with him—that this high officer of the Army, seeing the complication and difficulty in which that office was, by the restoration of Mr. Stanton to it, formed the opinion himself that for the good of the service, Mr. Stanton ought to go out and some one else take the place. Who could be a better judge of the good of the service than the distinguished officer who is now about to speak?

But the gentlemen say what are his opinions more than another man's opinions, if they are merely given as abstract opinions? We do not intend to use them as abstract opinions. The gentlemen did not read the whole question. It is not merely what opinion had you, General Sherman; but having formed that opinion, did you communicate it to the President, that the good of the service required Mr. Stanton to leave that Department; and that in your judgment, acting for the good of the service, some other man ought to be there.

[77] Second session Fortieth Congress, Senate Journal, p. 892; Globe supplement, pp. 163–166.

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This is no declaration of the President we are upon now. This is a communication made to him to regulate his conduct, to justify him, indeed to call upon him to look to the good of the service, and to be rid, if possible, in some way of that unpleasant complication. Anyone can see there was a complication there that must in some way or other be got rid of; for look at what the managers have put in evidence!

During the arguments Mr. Roscoe Conkling, a Senator from New York, submitted in writing this question:

Question. Do the counsel for the respondent offer at this point to show by the witness that he advised the President to remove Mr. Stanton in the manner adopted by the President, or merely that he advised the President to nominate for the action of the Senate some person other than Mr. Stanton?

Mr. Stanbery replied that counsel for the President did not propose either, but proposed to show that General Sherman gave his opinion for the good of the service, and for that good thought that somebody else ought to be in the office.

The question being submitted to the Senate, "Is the question admissible?" there appeared yeas 15, nays 35. So the question was excluded.

2251. On July 10, 1876,[78] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, testified that he had communicated to the Military Affairs Committee of the House of Representatives certain facts in regard to the post tradership at Fort Sill. Thereupon Mr. Manager John A. McMahon asked:

There has been a criticism made upon your communicating this matter to the Military Committee instead of communicating it through the regular channels to the Secretary of War. State your views of that question.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, on the ground that it might swear away an argument of the defense; but when the managers stated that a similar question had been put to another witness by Mr. Carpenter and admitted by the court the objection was withdrawn.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, said:

I object to that question myself, if counsel do not. I do not think the time of the court ought to be wasted with that sort of evidence.

Thereupon Mr. Manager McMahon withdrew the question.

2252. It was decided in the Belknap trial that a question to a witness might not be so framed that the answer might imply an opinion.

Instance wherein a President pro tempore ruled on evidence during an impeachment trial.

On July 11, 1876,[79] in the Senate for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by Mr. Matt. H. Carpenter, of counsel for the respondent, who asked this question:

Was there any corrupt agreement or any agreement between you and Mr. Belknap in regard to being appointed post trader at Fort Sill?

Mr. Manager John A. McMahon said:

We object to the word "corrupt." Say "any agreement." I think by using the word "corrupt" you are asking an opinion of the witness. The objection we make

[78] First session Forty-fourth Congress, Record of trial, pp. 229, 230.
[79] First session Forty-fourth Congress, Record of trial, p. 236.

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is that the question calls for an opinion as to the character of the agreement instead of calling for the agreement itself.

The President pro tempore [80] said:

The Chair sustains the objection.

2253. In the Swayne trial the opinions of witnesses, including answers to questions of mixed law and facts, were excluded.—On February 11, 1905, in [81] the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, A. H. D'Alemberte, was under examination, when Mr. Manager James B. Perkins, of New York, asked this question:

I ask the witness if Judge Swayne, to his knowledge, was in 1900 a resident of the county of which he was collector and in which Pensacola is situated?

Mr. Anthony Higgins, of counsel for respondent, objected, saying:

It is a question of law. We have no objection to the witness stating, but desire to have him state, every fact he knows about the movement or the residence of Judge Swayne, or where he actually or bodily was, but to ask a more conclusion of law is, we think, improper.

The Presiding Officer [82] said:

The question is, Was the respondent, to the witness's knowledge, a resident of Pensacola? The witness may answer the question.

The WITNESS. To my knowledge, he was not.

Q. (By Mr. Manager PERKINS). Was Judge Swayne a resident of Pensacola during that time?

Mr. John M. Thurston, of counsel for the respondent, objected, saying:

Mr. President, we are not objecting to their asking this witness whether or not in any particular year, month, week, or day Judge Swayne was in Pensacola. That would be a proper question. It would ask for a fact. But they are asking for a conclusion which can only result from the consideration of many facts related to the law.

The Presiding Officer said:

The witness is asked really for his opinion whether Judge Swayne was a resident at a certain place. If this witness can be so asked, any number of witnesses can be asked the question, and the decision of it would then depend upon the opinion of witnesses.

The question of residence is one of mixed law and fact, and must be determined, as the Presiding Officer thinks, by the Senate upon the proved circumstances and facts of the case and not upon the opinion of witnesses resident in that part of the country. So the question is excluded.

2254. On February 21, 1905,[83] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, William A. Blount, was under examination by Mr. John M. Thurston, of counsel for the respondent, when this question was propounded by Mr. Charles A. Culberson, a Senator from Texas:

Q. What was the manner of Judge Swayne as to anger or resentment in imposing sentence in the contempt proceedings?—A. That depends entirely upon the viewpoint of the man who was listening to him. I believed that he was right. It seemed to me——

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, I object to that. It is not an answer to the question. The witness is giving an opinion.

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[80] T. W. Ferry, of Michigan, President pro tempore.
[81] Third session Fifty-eighth Congress, Record, p. 2394.
[82] Orville H. Platt, of Connecticut, Presiding Officer.
[83] Third session Fifty-eighth Congress, Record, p. 2985.

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The Presiding Officer [83a] said:

The witness may state how he regarded the appearance of the judge in imposing this sentence. * * *

The Presiding Officer was about to say that he did not think the witness should make any comment in answering any question as to whether he thought the judge was right or not.

2255. On February 22, 1905,[84] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the respondent, Thomas F. McGowin, was examined by Mr. John M. Thurston, of counsel for the respondent:

Q. You heard all that was said?—A. I did; all that the judge said.

Q. Yes; all that the judge said. What was the general appearance of Judge Swayne in the delivery of these remarks?—A. As I recall it, I thought the judge spoke with a little more than ordinary deliberation and calmness and firmness, and the impression that was created on my mind was that——

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

Mr. President, I object to the impression created on the witness's mind. What he is entitled to testify to are facts that occurred there at that time.

The Presiding Officer [85] said:

Let the last phrase be stricken out. The witness can not testify in the impression made on his mind.

2256. In the Belknap trial objection was successfully made to an opinion of a subordinate officer as to evidence of the character of respondent's administration.—On July 12, 1876, in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Nelson H. Davis, Inspector-General of the Army, was examined as a witness on behalf of the respondent, and Mr. Matt. H. Carpenter, of counsel for the respondent, having ascertained that witness had been in the Army during respondent's entire administration and had been holding constant official relations with him, asked:

From all you know of the subject, and from all you know of General Belknap, I ask you what has been the general character of his administration of the War Department?

Mr. Manager George A. Jenks at once objected:

The objection I make to that is that a witness must testify to character instead of to the specific acts of this man, or general acts. He must know what has been said by those who are familiar with his administration in that office, instead of how has he done the business.

Mr. Manager George F. Hoar said:

We understand also that it should be the opposite of the particular offense charged. If a man is charged with adultery, his reputation for chastity; if he is charged with perjury, his reputation for veracity. We suppose the question should be, "What is the reputation of the Secretary for official integrity?" * * * We do not understand that it is competent to prove by a subordinate officer in the Army, as an expert, the general character of the administration of a great officer of state. There is no such thing as an expert in such an administration. We object to the question unless it is limited to the reputation of the Secretary for official integrity.

Mr. Carpenter said:

We shall claim when we come to sum up this case that the general management of the War Department by General Belknap is a proper subject of con-

[83a] Orville H. Platt, of Connecticut, Presiding Officer.
[84] Third session Fifty-eighth Congress, Record, p. 3049.
[85] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 261.

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sideration; that if they could establish this particular charge we could still prove the general management and official conduct of the Department, and then appeal to the Senate upon the whole record of the administration of that office whether this man shall be driven out into a little corner of his life or whether his whole conduct in the office is to be considered.

The Senate, without division, decided that the question should be admitted.

2257. A witness was permitted in the Belknap trial to give in answer a conclusion derived from a series of facts.—On July 10, 1876,[86] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was examined by the managers and testified as to payments of money to the respondent from remittances received from one Evans, who had been appointed post trader at Fort Sill through witness's efforts in collusion with respondent. The witness had testified to sending remittances to respondent by express, when Mr. Manager John A. McMahon aked:

Did General Belknap know where these moneys came from that you were sending to him?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

I object to that question. That calls for a conclusion, not for a fact. * * * A conclusion may be drawn from a correspondence running through years, and a dozen conversations; but it is a conclusion always. If you ask him what he told General Belknap, or what Belknap ever said to him, that calls for a fact; but to ask him whether he must have known such a thing calls for conclusion.

The question being submitted to the Senate, it was held, without division, to be admissible.

2258. In the Johnson trial the Senate sustained the Chief Justice in admitting as evidence of a general practice tabular statements of documents relating to particular instances.—On April 15, 1868,[87] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence certain certified documents from the Navy Department, being in the nature of tabular statements of the results shown by the records as to appointments and removals of officers. Mr. Curtis described what was offered as follows:

The documents I offer are not full copies of any record. They are, therefore, not strictly and technically legal evidence for any purpose. They are extracts of facts from those records. Allow me, by way of illustration, to read one, so that the Senate may see the nature of the document:

"NAVY AGENCY AT NEW YORK.

"1864, June 20. Isaac Henderson was, by direction of the President, removed from the office of navy agent at New York, and instructed to transfer to Paymaster John D. Gibson, of United States Navy, all the public funds and other property in his charge."

We do not offer that as technically legal evidence of the fact that is there stated; but having in view simply to prove, not the case of Mr. Henderson, with its merits and the causes of his removal, etc., all of which would appear on the records, but the practice of the Government under the laws of the United States; instead of taking from the records the entire documents necessary to exhibit his

[86] First session Forty-fourth Congress, p. 969; Record of trial, p. 226.
[87] Second session Fortieth Congress, Senate Journal, pp. 899, 900; Globe supplement, pp. 183–186.

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whole case, we have taken the only fact which is of any importance in reference to this inquiry. If the Senate consider that they must apply the technical rule of evidence, we must get the records and have the records copied, and of course, for the same reason, readmitted.

There was objection on the part of the managers, but after argument the Chief Justice [88] said:

The counsel for the President propose to offer in evidence two documents from the Navy Department, exhibiting the practice which has existed in that Department in respect to removals from office. To the introduction of this evidence the honorable managers object. The Chief Justice thinks that the evidence is competent in substance, but that the question of form is entirely subject to the discretion of the Senate and of the Senate alone. The whole question, therefore, is submitted to the Senate. Senators, you who are of opinion that this evidence should be received will, as your names are called, answer "yea;" those of the contrary opinion, "nay."

And there appeared yeas 36, nays 15. So the document was admitted.

2259. A summary by counsel of the contents of documents was held to be in the nature of argument and not admissible as evidence.—On February 23, 1905,[89] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the presentation of evidence, offered certificates from certain clerks of United States circuit courts, showing the dates at which the respondent had held court.

Then Mr. Thurston said:

For the convenience of the court and notification to the managers as to what we claim these certificates show, I will ask to have printed in the Record a list compiled by us from the certificates showing the various dates in a brief and concise form in the nature of a calendar, and also showing our computations of the number of days covered by them.

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

Mr. President I submit that the certificates when printed will show what they contain, and their computation is what we object to.

The Presiding Officer [90] said:

That is a part of the argument, and the Presiding Officer thinks should be withheld until the argument is commenced.

2260. In impeachment trials public documents are admitted in evidence for what they may be worth.

Ruling by the Vice-President as to evidence in an impeachment trial.

On February 15, 1805 [91] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Mr. Joseph Hopkinson, counsel for the respondent, offered in evidence a certificate of the clerk of the circuit court of Pennsylvania, to show that at the trial of Fries, in 1799, there were eighty-six civil suits depending.

Also a copy of the indictment on the first trial of Fries.

Also a part of a charge delivered by Judge Iredell at the term when Fries was tried, taken from Carpenter's report of that trial, page 14.

Mr. George W. Campbell, of Tennessee, one of the managers, intimating some objection to receiving this paper in evidence.

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[88] Salmon P. Chase, Chief Justice.
[89] Third session Fifty-eighth Congress, Record, p. 3163.
[90] Orville H. Platt, of Connecticut, Presiding Officer.
[91] Second session Eighth Congress, Annals, p. 243.

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The President[92] said it might be read as a report of the case; but what credit it would deserve it would be for the court to determine.

2261. On January 11, 1831,[93] in the high court of impeachments during the trial of the cause of The United States *v.* James H. Peck, the counsel for the respondent introduced as a witness Samuel D. King, a clerk in the General Land Office, to prove certain official records of that office relating to land grants in the Province of Louisiana.

The respondent was on trial for unlawfully oppressing Luke E. Lawless, whom he had imprisoned for contempt in criticising in the public prints the action of respondent as judge in a case relating to a land grant.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the introduction of the documents, alleging that they referred to land grants in a portion of the territory different from that in which the case in question had arisen, and that they did not show the practice in upper Louisiana, which was the region to which the pending trial related.

Mr. Jonathan Meredith, counsel for the respondent, said:

We produce it as a public document from the proper repository. It purports to be a genuine document, and it shows, as we shall contend, that the same regulations applied to the whole province.

On the question, "Shall these documents be given in evidence?" there appeared yeas 40, nays 0.

2262. In the Johnson trial a message of President Buchanan, published as a Senate document, was admitted in evidence.—On April 15, 1868,[94] in the Senate sitting for the impeachment trial of Andrew Johnson, President of United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered, with a view of showing the practice of the Government with reference to appointments to and removals from office, a message of President Buchanan, from the published Executive documents of the Senate.

Mr. Manager Benjamin F. Butler objected:

The difficulty that I find with this message, Senators, is, that it is the message of Mr. Buchanan and can not be put in evidence any more than the declaration of anybody else. We should like to have Mr. Buchanan brought here under oath, and to cross-examine him as to this.

The question being taken, the Senate decided, without division, that the evidence should be admitted.

2263. In the Johnson trial the managers were not required, in submitting a letter of respondent, to also submit accompanying but not necessarily pertinent documents.—On April 2, 1868,[95] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter of President Johnson to Gen. U.S. Grant, wherein were two portions referring to accompanying documents:

GENERAL: The extraordinary character of your letter of the 3d instant would seem to preclude any reply on my part; but the manner in which publicity has

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[92] Aaron Burr, of New York, Vice-President and President of the Senate.

[93] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 274, 275.

[94] Second session Fortieth Congress, Senate Journal, p. 900; Globe supplement, p. 191.

[95] Second session Fortieth Congress, Senate Journal, pp. 874, 875; Globe supplement, pp. 80–83.

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been given to the correspondence of which that letter forms a part and the grave questions which are involved induce me to take this mode of giving, as a proper sequel to the communications which have passed between us, the statements of the five members of the Cabinet who were present on the occasion of our conversation on the 14th ultimo. Copies of the letters which they have addressed to me upon the subject are accordingly herewith inclosed.

* * * * * * *

There were five Cabinet officers present at the conversation, the detail of which, in my letter of the 28th ultimo, you allow yourself to say, contains "many and gross misrepresentations." These gentlemen heard that conversation and have read my statement. They speak for themselves, and I leave the proof without a word of comment.

Mr. Wilson stated in introducing the letter that the special object of the managers in introducing it was to show the President's own declaration of an intent to prevent the Secretary of War, Mr. Stanton, from resuming the duties of the office, notwithstanding the action of the Senate and the requirements of the tenure of office bill.

Mr. Henry Stanbery, of counsel for the President, entered an objection which was, by direction of the Chief Justice, reduced to writing, as follows:

The counsel for the President object that the letter is not in evidence in the case unless the honorable managers shall also read the inclosures therein referred to and by the letter made part of the same.

In support of the objection, Mr. Stanbery argued:

The managers read a letter from the President to use against him certain statements that are made in it, and perhaps the whole; we do not know the object. They say the object is to prove a certain intent with regard to the exclusion of Mr. Stanton from office. In the letter the President refers to certain documents which are inclosed in it as throwing light upon the question and explaining his own views. Now, I put it to honorable Senators: Suppose he had copied these letters in the body of his letter, and had said just as he says here, "I refer you to these; these are part of my communication," could any one doubt that these copies, although they come from other persons, would be admissible? He makes them his own. He chooses to use them as explanatory of his letter. He is not willing to let that letter go alone; he sends along with it certain explanatory matter. Now, you must admit, if he had taken the trouble to copy them himself in the body of his letter, they must be read. Suppose he attaches them, makes them a part, calls them "exhibits," affixes them, attaches them to the letter itself by tape or seal or otherwise, must they not be read as part of the communication, as the very matter which he has introduced as explanatory, without which he is not willing to send that letter? Undoubtedly. Does the form of the thing alter it? Is he not careful to send the documents not in a separate package, not in another communications, but inclosed in the letter itself, so that when the letter is read the documents must be read? It seems to me there can not be a question but that they must read the whole and not merely the letter; for it was the whole that the President sent to be read to give his views, and not merely the letter unconnected with these documents.

Mr. Manager John A. Bingham argued against the objection:

We claim that we are under no obligation by any rule of evidence whatever, in introducing a written statement of the accused, to give in evidence the statements of third persons referred to generally by him in that written statement. In the first place, their statements, we say, would not be evidence against the President at all. They would be hearsay. They would not be the best evidence of what the parties affirmed. The matter contain in the letter of the President shows that the papers, without producing them here, have relation to a question of fact between himself and General Grant, which question of fact, so far as the President is concerned, is affirmed in this letter by himself and for himself, and concludes him; and we insist that if forty members of his Cabinet were to write otherwise if could not affect this question. It concludes him; it is his own declaration; and the matter of dispute between himself and General Grant, although it is referred to in this

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letter, is no part of the matter upon which we rely in this accusation against the President.

Mr. Bingham admitted that if the letters referred to contained a statement relating to the matter with which they charged the President, and if the letter now sought to be introduced showed a statement from them adopted by the President himself in regard to the matter, the objection of respondent's counsel would be well taken.

The question was taken, "Shall the objection of the counsel by the President to the evidence proposed to be offered be sustained?" and there appeared yeas 20, nays 29.

So the objection was overruled and the letter was admitted as presented.

2264. Instance in the Swayne case wherein a witness was permitted to testify as to the nature of a document which was on record in the trial.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[96] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Charles A. Culberson, a Senator from Texas, submitted a series of questions to a witness for the respondent, W. A. Blount:

Q. Were you counsel for O'Neal in the contempt proceedings against him before Judge Swayne?—A. I was.

Q. Did you raise a question of jurisdiction of the court in those proceedings? If so, please state such question fully and how it was raised.—A. I raised the question by a demurrer.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, while ordinarily we would have no objection to the answer which we anticipate, yet the O'Neal case is all here of record, and objection was made yesterday to our asking the witness Greenhut as to the injury he received and which was exhibited in court at the time of that trial. The objection was based upon the fact that the complete record being here we could not go outside of it. Therefore in return I make the same objection that the record of the O'Neal case shows every proceeding that was had therein, including any objection that may have been taken to the jurisdiction.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, said:

Before that is done, may I make a suggestion? This is a very different matter from the testimony which was sought to be brought out by Greenhut. There the attempt was to prove by him the extent of his injuries in a street combat, with no evidence that the facts as to which he was to testify had been before the court. Our objection was not because of the fact that it was in the record, but that it was proposed to prove something as an excuse for the judge which had not been before him at the trial of the case, while here this witness is asked to testify to what occurred at the trial of the contempt case.

The Presiding Officer [97] said:

Shall the witness answer the question? [Putting the question.] In the opinion of the Presiding Officer the ayes have it. [A pause.] The ayes have it, and the witness will answer.

2265. Instance in the Swayne trial wherein, with the concurrence of counsel, the managers introduced without oral testimony a certified copy of a court record.

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[96] Third session Fifty-eighth Congress, Record, p. 3147.
[97] Orville H. Platt, of Connecticut, Presiding Officer.

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In the Swayne trial, evidently by written stipulation between managers and counsel, certified copies of records were used in the same way as the original might have been used.

On February 14, 1905,[98] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Samuel L. Powers, of Massachusetts, said:

I offer in evidence, Mr. President, a certified copy of the court record in what is known as the "O'Neal case." This record is made up of what is known as the complaint upon which the order of attachment in this contempt case was issued, and also a demurrer to the original complaint, which appears to have been disposed of, and also the affidavit of the respondent, which is an answer to the complaint, together with other documents, showing the disposition of that case.

It has been agreed between counsel for the respondent and the managers that this record may go into evidence without being read before the court. It is very long and would occupy possibly an entire session if it were read. But I assume, Mr. President, in order to have it go into evidence without being read, it is necessary that we should have the permission of the court to do so. So I tender this record with the request that it become a part of the evidence in this case and be printed as such without first being read to the court.

After the presentation of the affidavits, Mr. Augustus O. Bacon, a Senator from Georgia, said:

Mr. President, before the manager proceeds, as he says he will call only one witness, I desire to know whether the affidavits and such other matters as were included in these answers are offered and accepted as evidence without testimony being given from the stand? I simply wish the information.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, there is no objection on the part of the respondent.

I will state, Mr. President, in respect to that matter, that this is the first trial in this court that I am aware of where a stenographic record of what occurred in another court has been presented here.

In the Peck case, seventy-five years ago, the testimony of what occurred in Judge Peck's court was entirely dependent upon the oral testimony of the witnesses who were present at that trial. It has seemed to counsel for the respondent that they were fortunate in the O'Neal case that a stenographic record had been made and preserved, and that it could be presented here, so that this court would know precisely what had occurred there.

I think therefore it is better that it should go in in that form, even though without the sanction of an oath in this tribunal.

2266. On February 21, 1905,[99] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was under examination by Mr. John M. Thurston, of counsel for the respondent, when these questions were asked:

Q. Of the original contempt charge. I ask you now directly as to the other defendant in it, Mr. Paquet.—A. Judge Paquet first appear in answer to the citation with counsel, and objected to the proceeding upon the ground that Judge Swayne did not have jurisdiction, as the transaction in which counsel were engaged was not an official transaction of an officer of the court Judge Swayne overruled that contention, and Judge Paquet asked for time in which to make an answer. Thereupon he sued out a writ of prohibition from the circuit court of appeals, which was heard before that court and denied, and then he appeared in the circuit court before Judge Swayne and filed a paper, which was an apology and a purging of the contempt, as I understood, though the paper speaks for itself.

Q. (By Mr. Thurston.) What followed that?—A. Thereupon he was discharged without punishment.

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[98] Third session Fifty-eighth Congress, Record, pp. 2540, 2551.
[99] Third session Fifty-eighth Congress, Record, pp. 2983, 2984.

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Mr. Thurston then said:

We offer in evidence a certified transcript of that portion of the record in the case, merely asking to have read the paper in which Judge Paquet confessed and purged himself of contempt.

This certified transcript was as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA, AT PENSACOLA—IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST LOUIS P. PAQUET

Now comes Louis P. Paquet, respondent in the above-entitled matter, and says:

That upon full and mature consideration of his actions and conduct in the matter referred to in the motion, made as the basis of the above-entitled proceedings, through excessive zeal in behalf of his clients, he did so act that this honorable court was justified in believing that the said actions were committed in contempt thereof and as showing disrespect therefor. That respondent regrets exceedingly the course taken by him in this matter, and now appears in court and requests that he be permitted to apologize for his behavior and file with the records in the above-entitled cause this paper.

LOUIS P. PAQUET, *Respondent.*

Filed March 31, 1902.

F. W. MARSH, *Clerk.*

IN THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF FLORIDA—THE UNITED STATES V. LOUIS P. PAQUET

This cause coming on to be heard, on the application of Louis P. Paquet to withdraw his answer in the above-entitled cause, and the submission of his explanation and apology by the said defendant—

It is now ordered that the said defendant do have leave to withdraw his answer heretofore filed and to subtract the same from the files of this court, and that this court do accept the said apology and statement filed on March 31, 1902, and the said defendant is hereby discharged from the rule to show cause, heretofore granted against him.

Done this April 1, A.D. 1902.

CHAS. SWAYNE, *Judge.*

(Indorsement: United States v. Louis P. Paquet. Order. Filed April 2, 1902. F. W. Marsh, clerk.)

UNITED STATES OF AMERICA, *Northern District of Florida*:

I, F. W. Marsh, clerk of the district court of the United States for the northern district of Florida, hereby certify that the foregoing is a true and correct copy of an original paper or document filed in the cause therein specified in said court on the day therein set forth, as the same remains of record and on file in said court.

Witness my hand and the seal of said court at the city of Pensacola, in said district, this 3rd day of Febuary, A.D. 1905.

[SEAL.] F. W. MARSH, *Clerk.*

Mr. Manager Henry W. Palmer, of Pennsylvania, said:

We object to that paper. It has never appeared in evidence in this case. The original has never been seen, and whether any such paper exists we do not know. We object to this extract from the minority report, because it was never in the case. * * * The first place where that paper ever appeared is in the minority report. It has never been seen by anybody except perhaps the people who made the minority report. I say it was never offered in evidence in any place. I should like to see the origianl, if you have it.

Mr. Thurston replied:

This is certified to by the clerk of the court as being a part of the record, and I think, if you will permit me, I have in my pocket the stipulation with the managers that certified copies of records may be produced and used in evidence in the same manner that the original documents could be.

The Presiding Officer [100] said:

[100] Orville H. Platt, of Connecticut, Presiding Officer.

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The Presiding Officer thinks an official copy of the proceedings in court is proper evidence; and as to the other question, whether this is evidence or not, three parties were proceeded against for contempt. It was one proceeding. The action of the court with regard to two of them has been introduced in evidence, and the Presiding Officer thinks that the action of the court in regard to the third of the persons complained of for contempt can properly be admitted.

2267. By a close vote, after elaborate argument, the record of Congressional debates was admitted during the Swayne trial as having a bearing on the construction of a law.

Instance during the Swayne trial wherein the Presiding Officer, contrary to his usual habit, submitted a question of evidence to the Senate at once.

On February 23, 1905,[101] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of evidence, presented and asked to have incorporated in the Record certain extracts from the official debates of Congress. He explained:

These are the debates on three separate occasions when the provisions of law relating to the payment of expenses for travel and attendance of judges holding court outside of their districts were under consideration. We offer it as a part of the parliamentary history of the enactment of these laws and as having some bearing upon their construction.

Mr. Manager Martin E. Olmsted, of Pennsylvania, objected, saying:

Mr. President, the honorable counsel for the respondent offers certain extracts from the Congressional Record purporting to contain some portions of the debates at various times upon provisions of pending bills, which subsequently became statutes, relating to the payment of expenses of district judges for the purpose as he states, of construing those acts of Congress. To that we object, first, that it is not competent nor proper in the construction of a statute to consider the debates in Congress, and, second, that if admitted, it would require us in rebuttal to produce all the other portions of the debates, and then to call all those Members of Congress who are not present to ascertain their views upon the construction of the statute for which they then voted. Upon that I will take a very few minutes to refer the Presiding Officer and the Senate to what seems to me to be an entirely conclusive authority upon the subject.

It was decided in The United States *v.* Freight Association (166 U.S., p. 260) as stated in the syllabus:

"Debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body."

Mr. Justice Peckham delivered the opinion of the court. On page 318 he said:

"Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the Members of each House in relation to the meaning of the act. It can not be said that a majority of both Houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various Members had various views, and we are left to determine the meaning of this act, as we determine the meaning or other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (United States *v.* Union Pacific R. R. Co., 91 U.S. 72; Aldridge *v.* Williams, 3 How., 9, Taney, Chief Justice; Mitchell *v.* Great Works Milling and Manufacturing Co., 2 Story, 648; Queen *v.* Hertford College, 3 Q. B. D., 693.)

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might

[101] Third session Fifty-eighth Congress, Record, pp. 3164–3167.

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differ from each other, the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it passed."

Now, Mr. President, you will readily see from the few disjointed remarks in the body at the other end of the building, the bill coming before it for the first time, one Member taking an offhand view of a paragraph and saying so and so, and another saying something else, and the great body who vote for it saying nothing, it is improper—and the Supreme Court has so held, and so have the courts of England—that it is absolutely improper to look into the debates for the purpose of construing an act of assembly. You will see at once that in order to do full justice to the subject it would be necessary to call all those Members who did not vote and ascertain their views; which would amount to taking a new vote in the House of Representatives to determine upon the construction of an act of assembly, the construction of which is proper matter for the courts, and in this instance for the Senate sitting as a court.

Mr. Thurston argued:

We offer to prove that on April 24, 1896, when this provision was before the Senate of the United States, the meaning of the clause was discussed on the floor of the Senate, and growing out of that discussion, and for the avowed purpose of making its meaning explicit, an amendment was attached to the clause in the Senate declaring, in substance, that nothing but actual expenses or moneys actually expended should be allowed the judges. That amendment was put on in the Senate. It went to conference and was rejected by the conference report, thereby, as we claim, determining that it was not the sense of the Congress of the United States that this allowance should be of moneys actually expended by the judges.

We further claim that in the proceedings of the House of Representatives, while a similar provision was under consideration on January 27, 1903, an amendment was offered, the purport of which was to prohibit the allowance to these judges of any traveling expenses where they had not actually made the expenditure of money; in other words, to prohibit them from certifying under the law to their traveling expenses when they had been riding free; and that amendment, made for that specific purpose, was rejected by the House, thereby showing, as we contend, the clear intention of Congress to allow the judges to certify and receive necessary or reasonable traveling expenses whether they paid the money out or not.

We further propose to show that in the House of Representatives on January 27, 1903, while a similar provision was under consideration * * * that the House of Representatives on the date I have last named, in further consideration of this appropriation, took proceedings whereby an amendment was offered to prevent the judges of the courts of the United States from receiving free railroad transportation, which amendment by the House of Representatives was rejected, thereby attesting, as we believe, the opinion or construction of the House of Representatives that the provision of the law permitted judges to receive from the Treasury of the United States reasonable traveling expenses whether they paid their fare or rode free.

Mr. Anthony Higgins, also of counsel for respondent, argued:

Mr. President, in the first place, there are two classes of legislative proceedings incorporated in this offer, as I understand. The one referred to by my colleague in the beginning of his remarks on this offer is where we offered to show the parliamentary history of the clause in the act of June 11, 1896, which is an offer to show an amendment proposed by a Senator, and the adoption thereof in the Senate, and afterwards a conference report, in which the amendment adopted by the Senate was stricken out and a substitute for the same enacted; and in that shape the act of 1896 became a law.

Now, quite apart from the question of the admissibility of debates as to the construction of a statute is the principle that applies on this offer, for I find it laid down by the Supreme Court in the case of The United States *v.* Johnson (124 U.S., 237–253), which supports this proposition:

"In like manner cogent and persuasive is the construction placed by either or both of the two Houses of Congress by legislation and in debate upon the statute."

The syllabus of that case is as follows:

"The joint resolution of Congress of March 31, 1868 (5 Stat., 251) affords evidence that the practice of the Secretary of the Treasury prior to that date

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not to cover into the Treasury the sums received from the sale of captured and abandoned property, but to retain them in the hands of the Treasurer in order to pay them out from time to time on the order of the Secretary, was known to Congress and was acquiesced in by it, as to what had been previously done; and all this brings the practice within the well-settled rule that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In other words, Mr. President, those legislative proceedings will make plain that the construction by a Senator upon the act of Congress under which district and circuit judges are paid when absent from their homes in the one case or their districts in the other holding court—that the construction which the learned managers place upon that act was the one which was sought by a Senator in that debate to place upon that statute in express words, and the Senate passed the amendment, and the conference committee struck it out. The Senate amendment, which was virtually a proviso that no expenses should be certified other than those that were actually incurred, was stricken out, and in place of it the last section of the act 1891, creating the circuit court of appeals, was substituted for it, which said that when these sums were paid to the judge by the marshal they should be allowed to the marshal in his accounts. That clearly comes within the case of The United States *v.* Johnson and of the acquiescence by Congress. It is a much stronger case; it is more than an acquiescence by Congress in the construction, for it is by legislation making the statute in terms to be what excludes the construction that was sought to be put on it by a specific amendment to that effect.

That is a different thing from the mere opinions that are expressed by Members of either House of Congress at the time when a bill is in consideration before it; it is a part of the legislative history of the act, the amendment adopted by the Senate and its being stricken out in conference, and another feature added to the law in substitution for it being a part of our offer in what we seek to prove.

Now, Mr. President, I submit to the Senate that the principle which has been adduced in the case of The United States *v.* Freight Association (166 U.S.) is not applicable to the case that is now before the Senate. It is not simply and merely a question as to what is the construction that would be put upon the act in question by a court; it is not a question as to the construction that will be put upon it by any member of this tribunal. The question, we respectfully submit, is whether or no this statute admits of a doubtful construction and is open to more than one opinion. If a statute is ambiguous, if it has been loosely drawn, if it is not clearly and without any uncertainty of one construction, and therefore not open to construction, then we have authority as old as Judge Story, and coming from authority as high as his, that in a case involving the accounts of an officer under such a statute any doubts are to be resolved in favor of the officer; and by a line of authority in the Supreme Court of the United States, followed frequently and numerously in the circuit courts and in the Supreme Court of the United States, we have a long line of authority that where a statute is in the least degree open to construction, and in many cases, Mr. President, where is has not been open to construction a long-continued construction of it by the executive officers of the Government has been held to be cogent, to be persuasive, to be decisive.

I had not expected to go into the presentation of that line of authority on this particular question—the question as to whether or no you would admit debates in Congress. Those debates, Mr. President, under the principle which I have now ventured to enunciate—and I do not suppose it will be disputed—go to the point that if the Congress itself in the debates placed a different construction upon this act from what the learned managers place upon it, there could be no crime in this respondent in placing a like construction upon it; that what here was said, and in another body in debate, as to what was the understanding of Congress as to the meaning of this act when Congress was in the process of enacting it, and again and again in repeated years on appropriation bills in identical terms this same statute has been brought up again and again in debate, that what was said there and then by Members of Congress as to the received construction of this act, totally different from that of the honorable managers, goes to show that this could not have been a statute that was not open to a difference of construction and opinion.

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Mr. Manager Olmsted replied:

The long line of authorities which the counsel has cited seems to resolve itself down to the case of Johnson * * * in which the recitals in a joint resolution were accepted as evidence, in accordance with the well-known principle of law that the recital in the preamble of a public act of Parliament of a fact is evidence to prove the existence of the fact, not the debates in the House or in the Senate when the joint resolution was passed, but the joint resolution itself. That is the English and American doctrine.

I will simply add one more authority and rest. In the case of The United States against The Union Pacific Railroad (91 U.S., 72), Mr. Justice Davis, delivering the opinion of the court, said, on page 79:

"In construing an act of Congress we are not at liberty to recur to the views of individual Members in debate nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used."

The Presiding Officer said:

The Presiding Officer will submit this question to the Senate: Counsel for the respondent propose to offer certain extracts from the Congressional Record, including debates in the House and Senate, votes in the House and Senate, for the purpose, as stated, of showing the history of the enactment by which the United States judges holding court out of their districts are entitled to expenses and as throwing light upon the true construction of the act. [Putting the question.] In the opinion of the Presiding Officer the noes have it.

Mr. John C. Spooner, a Senator from Wisconsin, demanded the yeas and nays, and the same being taken, there appeared, yeas 34, nays 33. So the evidence was admitted.

2268. The Senate declined to admit in the Belknap trial testimony taken before a House committee and published as a public document.

Instance wherein a Senator objected to evidence which was not objected to by managers or counsel.

On July 1, 1876,[102] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, H. T. Crosby was sworn and examined by the managers and was asked if he had any recollection that General Hazen had testified before the Military Affairs Committee of the House of Representatives in regard to the post tradership at Fort Sill. The witness responded in the affirmative. Then Mr. Manager John A. McMahon asked:

Did General Belknap, to your knowledge, know that the testimony had been given by General Hazen before the Military Committee in regard to Fort Sill?

To this witness replied that he thought General Belknap (the respondent) did know, but this was only an impression which rested on no facts that he could recall.

Mr. Manager McMahon then said:

We propose to show, and we now offer to test the question, the testimony of General Hazen before the Military Committee of the House on the 22d day of March, 1872, and we propose to supplement that with the orders issued from the War Department on the 25th day of March, 1872, which was a very good order but did not quite reach the Fort Sill case. We offer it now, and desire that the testimony of General Hazen, as published in an official document, shall be read:

Mr. Matt. H. Carpenter, of counsel for the respondent, did not object, but said:

It is testimony taken not only not in this Chamber, but taken in pais. * * * The point I want to suggest to the consideration of the manager only is this, that

[102] First session Forty-fourth Congress, Senate Journal, p. 961; Record of trial, pp. 186–189.

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I never heard one man tried on testimony given in some other tribunal. Without proof that the witness was dead or could not be called, and that the party was present and cross-examined him, it can not be done in a civil case. I suggest to the managers that it would be remarkable if you could read a deposition taken somewhere else.

After discussion, Mr. John Sherman, a Senator from Ohio, said:

I should like to ask the witness a question through the Chair. Did General Belknap read or hear the testimony of General Hazen?

The witness said:

I do not know, sir.

Mr. Sherman also asked:

I will ask whether that testimony of General Hazen was published in the public journals and brought to the knowledge of General Belknap.

The witness replied:

I do not know.

Mr. Sherman objected to the introduction of the testimony at this stage of the proceedings.

Later, during the examination of Gen. Irvin McDowell by Mr. Manager McMahon, the following occurred:

Q. In the conversation between you and General Belknap, besides referring to this article in the New York Tribune, did you refer to the fact that General Hazen had testified before the Military Committee?—A. I think that I mentioned the fact that I learned from General Garfield that General Hazen had done so. I think General Belknap told me that General Hazen had done so and had said substantially the same thing. I think General Belknap was indignant at General Hazen having done so instead of having come to him. I think he thought he owed it to him to have made this statement to him personally instead of going elsewhere.

The managers then offered as evidence this order:

[Circular.]

WAR DEPARTMENT,
Washington City, March 25, 1872.

I. The council of administration at a post where there is a post trader will from time to time examine the post trader's goods and invoices or bills of sale; and will, subject to the approval of the post commander, establish the rates and prices (which should be fair and reasonable) at which the goods shall be sold. A copy of the list thus established will be kept posted in the trader's store. Should the post trader feel himself aggrieved by the action of the council of administration, he may appeal therefrom through the post commander to the War Department.

II. In determining the rate of profit to be allowed, the council will consider not only the prime cost, freight, and other charges, but also the fact that while the trader pays no tax or contribution of any kind to the post fund for his exclusive privileges, he has no lien on the soldiers' pay, and is without the security in this respect once enjoyed by the sutlers of the Army.

III. Post traders will actually carry on the business themselves and will habitually reside at the station to which they are appointed. They will not farm out, sublet, transfer, or sell or assign the business to others.

IV. In case there shall be at this time any post trader who is a nonresident of the post to which he has been appointed, he will be allowed ninety days from the receipt hereof at his station to comply with this circular or vacate his appointment.

V. Post commanders are hereby directed to report to the War Department any failure on the part of traders to fulfill the requirements of this circular.

VI. The provisions of the circular from the Adjutant-General's Office of June 7, 1871, will continue in force except as herein modified.

By order of the Secretary of War.

E. D. TOWNSEND.

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Then Mr. Manager McMahon said:

Now, if the Senate please, we propose to offer the testimony of General Hazen, as taken before the committee, for this reason and this purpose: We find from two different sources that General Belknap is advised of the fact and becomes indignant with the knowledge that General Hazen has testified to the existence of certain abuses at Fort Sill which lay directly within his province to correct.

Mr. Matt H. Carpenter, while not objecting formally, said:

You do not prove by anybody that General Belknap ever read that testimony to know what it was. The indignation arose from the fact that he had been talking before a committee when he ought to have gone through directer channels, through the Army.

Mr. Sherman having persisted in his objection, the question was submitted to the Senate.

Mr. Roscoe Conkling, a Senator from New York, asked:

Is that the testimony upon which the Senate is asked to vote that the respondent here was charged with a knowledge of this testimony so as to admit it as a declaration made to him?

Mr. Manager George F. Hoar replied:

I understand that General McDowell's testimony is that General Belknap said to him that General Hazen had testified in subtance to the same matters which were contained in the New York Tribune article. * * * Therefore stating to him a knowledge of the substance of General Hazen's testimony. Now, if he had that knowledge of the substance of General Hazen's testimony, it tends to show that he knew that these periodical payments of money which came to him from Marsh were payments of money that had come to Marsh from the post trader. If I am in error as to the extent to which General McDowell's statement went, I can be corrected by referring to it. In other words, if General Belknap was receiving once every three months a sum of money from Marsh in New York, it is important for the Senate to know whether Belknap was informed that those moneys were moneys which were being improperly paid in consequence of this bargain of the post trader at Fort Sill to Marsh; in other words, that he knew where the money he was receiving came from. The article in the New York Tribune contains a distinct assertion of those payments by Evans to Marsh, and, as I understand it, the testimony of General Hazen contains in substance the same thing. It is therefore important not as proving the truth of anything that General Hazen said, but as proving that the Secretary of War was notified that such thing was said at that time.

The question being taken, the Senate declined to admit the testimony, yeas 20, nays 31.

2269. Testimony taken before a House committee and seen by respondent was admitted in the Belknap trial, not as evidence of the fact but as a partial foundation for an inference.—On July 11, 1876,[103] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the Committee of the House of Representatives which had reported the evidence against the respondent, was examined as a witness on behalf of the United States. The witness was shown the manuscript copy of the testimony given by one Caleb P. Marsh before his committee, and, after he had identified it, was asked by Mr. Manager John A. McMahon:

After the testimony of Mr. Marsh was taken, state what action your committee took in regard to it so far as the Secretary of War was concerned.

To this question Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

[103] First session Forty-fourth Congress, Senate Journal, p. 974; Record of trial, pp. 245–249.

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Mr. McMahon explained the objects of the introduction of the testimony:

We propose to put in evidence the fact that the witness Marsh was examined; that his testimony was reduced to writing; that the Secretary of War was officially notified of the fact; that he appeared; that the testimony was read over to him; that he took time to consult; that he finally came in and presented his resignation to the committee, from which we shall draw our inferences as far as the situation permits. That is all. * * *

Mr. George G. Wright, a Senator from Iowa, asked of the manager:

Do I understand that the managers propose to introduce this testimony and follow it by the single proposition that thereupon the Secretary of War resigned, and thereby ask the Senate to draw a conclusion, or that there was anything said by him or done by him other than the mere resignation?

To this Mr. McMahon replied:

I have already stated that we expect to show that the investigation was continued from one hour in the day until another and then continued until the next day, and that while they were waiting for the matter the resignation was brought in and handed to the committee; and I accept the statement of the distinguished counsel, if he desires it in, for the express purpose of preventing his being impeached. If he desires to prove that fact, I have not any objection certainly.

Mr. Roscoe Conkling, a Senator from New York, asked of the manager:

Shall I understand the managers to propose either to read at large the testimony of Marsh or to have that testimony received here and go upon the record, all for the purpose of proving that after it was delivered the respondent resigned his office? Is that the scope of this proposal, or is it intended to put into the case what Marsh testified in another form on another occasion, that that testimony may speak in this trial?

Mr. Manager McMahon replied:

Mr. President, I will answer the honorable Senator. It is offered in part only for the purpose which the honorable Senator from New York has eliminated from my remarks. The entire purpose is to show that substantially the same testimony as has been given here, not a different statement, but substantially the same statement as has been made here, was read over to the Secretary of War as a charge by one of the coordinate branches of the Government, to which he made no statement under oath or otherwise, and that the substantial facts therein stated having been brought to his knowledge and read without dispute, we are entitled to draw two inferences, the one from his resignation and the other from his failure to deny the facts therein stated, whatever they may have been.

Thereupon Mr. Jeremiah S. Black, of counsel for the respondent, said:

That is, you want to use it as a confession.

To this Mr. McMahon replied:

If you put it in that severe light, probably yes.

Mr. Montgomery Blair, of counsel for the respondent, said:

I ask the attention of the Senate to the scope of the question which is now to be acted upon, and I put it to this body to say whether any legitimate conclusion such as the counsel for the Government seeks to draw from the conduct which he seeks to prove here would be authorized by the proof. The whole object of the gentleman is to show that in consequence of similar proof being offered before the Committee on War Expenditures and being made known to the defendant in this case he thereupon resigned his commission as Secretary of War, and he admits that at the time this resignation was put in it was done in consequence of an understanding which then was had that thereby impeachment or an action of this kind which is now here pending would be avoided.

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Mr. Manager McMahon here interposed:

You misunderstand me. I say if you can prove that, I have no objection.

Mr. Blair continued:

Well, I understand that that is the proof which is to be offered, and is the nature of the case to which the managers now invite this court. Now, I ask the court to consider the state of proof to which the managers invite your attention, and to say whether or not any such conclusion as they seek to have you draw from it could be legitimately drawn. They ask you to draw a conclusion from the fact that the Secretary of War on seeing the proof resigned his office. I ask this court if that is a confession of guilt, or whether anybody in his senses could draw such a conclusion from it, even if it were not accompanied with the facts which we intend to prove if the matter is gone into. We intend to show that the reason of the resignation was that we wanted to avoid this trial, and had reason to believe that the committee before whom this testimony was taken concurred with us in the belief that that would be an avoidance of this trial. Now, take the whole scope of the case, because here is voluminous testimony to be offered and to be considered, and I ask the Senate to consider now before we go into it whether or not any such conclusion as the managers seek to draw from that can be legitimately drawn.

The question being taken, the Senate without division decided to admit the question.

The witness then answered the question, stating that the respondent was shown the testimony of Marsh, that he did not reply to it, and that he sent to the committee information of his resignation as Secretary of War.

Then Mr. Manager McMahon said:

Now we offer in evidence the testimony, the original paper, that was taken before the committee. * * * I offer it in evidence because, of course, it is impossible for this court to know to what extent the defendant was implicated by this testimony unless we know just exactly what the testimony was; and the strength of the inference, or its weakness, must of course be determined by the strength or weakness of the charges and the directness of the testimony.

Mr. Carpenter, of counsel for the respondent, having intimated but not formally made an objection, Mr. Roscoe Conkling, a Senator from New York, said:

Shall I understand that it is now proposed to offer here for any purpose the testimony delivered by Marsh before the committee of the House? If it is, if nobody else does, I raise an objection to that, on the ground that it is incompetent; and I ask for the yeas and nays upon it.

Mr. Francis Kernan, a Senator from New York, asked:

Is the object to have it read as evidence in this case, or read as a communication made to Mr. Belknap?

Mr. Manager McMahon replied:

To have it read precisely upon the principle that the article in the New York Times of February 15, 1872, was read, as a charge of certain matters therein stated, but not as evidence of the truth of anything therein stated. Every lawyer, I think, can see the difference.

Mr. Thomas F. Bayard, a Senator from Delaware, asked:

What is the object and intent of the offer?

Mr. Manager McMahon replied:

I think the honorable Senator from Delaware will remember that in my answer to the remark of the Senator from New York who sits farthest from me [Mr. Kernan] I stated distinctly the object and purpose of this offer not

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as evidence to this court of the truth of any fact therein stated, but simply for the purpose of showing that at a particular time certain charges from an authorized source were made against the defendant, which were read to him for the purpose of ascertaining what action he took after this was communicated to him.

Mr. Bayard asked further:

Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh, the witness, or to establish any fact therein referred to, or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him?

Mr. Manager McMahon replied:

Mr. President, the question put to the managers is as follows: "'Is it the object of the present inquiry to corroborate or discredit the testimony of Marsh?" In the first place, I will answer in detail that it is to corroborate Mr. Marsh in just this far, not as evidence of any facts stated therein, but when the charge was made by Marsh the Secretary of War by his conduct admitted the truthfulness of it.

Secondly, "Or to establish any fact therein referred to." Not as evidence of any fact therein referred to except in this way, when the fact is charged against the defendant, to draw a conclusion as to its truthfulness or untruthfulness by the action of the Secretary of War in regard to it.

"Or solely to prove what was the action or conduct of Mr. Belknap when the fact that such charges had been made against him was so made known to him." It is solely for that purpose; but from that we draw our conclusion as to the truthfulness or untruthfulness of the charge there stated, but do not seek to establish any minor details on that point.

Mr. Carpenter, arguing against the admission of the evidence, said:

If it is competent to introduce this testimony given by Marsh before the House committee simply because Belknap did not say anything in reply to it, is it not competent to introduce here every newspaper article that has charged him, from Maine to California, with being guilty of this offense, and with being a thief and all that sort of thing, to which he has, under direction of counsel, never opened his mouth, to which he has never written a reply, of which he has never taken the slightest notice? Upon what principle could you introduce the deposition of this witness simply because it was read to the defendant and he said nothing, and exclude a newspaper article which you could show he had seen and to which he had said nothing? We did not care when the article from the New York Tribune was offered to object for certain reasons. It was very doubtful in our mind whether that was legal testimony; but we did not care to object to it. But here is an offer made now the result of which, if sustained, is that if they can show that a newspaper has published an article charging him with being a thief in this particular, calling him all the hard names they can think of in consequence of these charges made here, and that he read it and threw it down, making no remark, that would be as competent as this testimony. It must be borne in mind that that committee had no jurisdiction over Mr. Belknap. Mr. Belknap could have no trial before that committee. A few things may be mentioned in a political trial that would not be proper in a court of law. It was well known that that committee was of an opposite political faith, and it was not expected that much justice would be done to Mr. Belknap or any other Republican; and any lawyer, I think, who had been consulted by Mr. Belknap would have given him the advice which he did receive, and that was to let the committee alone till they got through, and then see what their charges amounted to. But if the managers can introduce this evidence upon the ground that it was read to him and he said nothing, I submit that every newspaper article which can be shown to have been seen by him is evidence if they can also show that he read it and made no reply.

The question on the admission of the testimony being taken, the Senate decided, yeas 24, nays 14, that it should be admitted.

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On July 19 [104] John S. Evans, post trader at Fort Sill, was examined as a witness, and was asked this question by Mr. Carpenter, of counsel for the respondent:

Mr. Evans, after you went back to Fort Sill with your appointment would you have reduced your prices but for the contract made with Marsh?

Mr. Manager McMahon objected, and the Senate, without division, excluded the question.

Mr. Carpenter then said:

Now, Mr. President, following the example of the managers, I offer here in partial corroboration of this witness his examination before the committee of the House, in which he swore distinctly that he would not have made the change of a shilling and that he never would have put prices down until he was compelled by the commission of officers that had jurisdiction.

Mr. Manager McMahon said:

This matter is considered to be ruled out under the decision already made, I take it. If the Senate will not let him swear to it here in open court, they certainly will not allow you to corroborate him in that way.

After argument, during which Mr. Carpenter quoted the words of Mr. Manager McMahon as to the Marsh testimony, wherein he stated that the object was to corroborate Marsh's oral testimony to a qualified extent, the question was taken, and the Senate, without division, excluded the testimony.

2270. Although Judge Swayne had been a voluntary witness before the House investigating committee, the Senate decided that the record of his testimony was prohibited by statute from use in the trial.

Discussion as to the status of the Senate as a court during an impeachment trial.

An argument that an impeachment trial is not a criminal proceeding.

As to whether or not there is a distinction between a misdemeanor and a high misdemeanor.

Instance of an appeal from the decision of the Presiding Officer on a question of evidence during the Swayne trial.

On February 14, 1905,[105] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, made the following offer of testimony in support of the articles relating to respondent's alleged improper use of a railway car:

The managers offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

Mr. John M. Thurston, of Nebraska, objected to the introduction of this evidence, claiming that it was prohibited by section 859 of the Revised Statutes:

No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony.

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[104] Senate Journal, p. 982; Record of trial, p. 281.
[105] Third session Fifty-eighth Congress, Record, pp. 2536–2540.

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Mr. Thurston said:

Judge Swayne did appear; he was examined and cross-examined, and, speaking a little outside of the record, I know that these questions the managers propose to ask him relate mostly, if not wholly, to his answers made on his cross-examination. But, Mr. President, the law of Congress does not distinguish between a man who comes before Congress or a committee of his own volition and a man who is haled there by process. The prohibition of the statute is as broad as human language can make it. It was designed for a wise and beneficient purpose, and no thought, in our judgment, ought to be had here by the managers in this case against our objection of attempting to override that statute of the Congress of the United States. * * * Mr. President, just a word or two in reference to this last suggestion, which is one which I had not expected to hear—that this trial is not a criminal proceeding. What is it, Mr. President? It has been held through all the history of impeachment trials to be in accordance with trials of persons charged with crimes. The verdict to be rendered in the case is one of "Guilty" or "Not guilty"—a verdict which is only appropriate in a criminal proceeding. Punishment is not of life, or limb, or liberty, but, sir, it is a far graver one, in my judgment, than any of those would be. It is a punishment of so grave a character that it can only be inflicted, under the Constitution of the United States, on being found guilty of high crimes or misdemeanors, and yet the gentleman says, with apparent sincerity, that this is not a criminal proceeding. You are trying this man here on a charge that he is guilty of a high crime or a high misdemeanor, and yet you say it is not a criminal proceeding.

Now, Mr. President, Charles Swayne, as the record shows, appeared before the House subcommittee and was sworn as a witness, and testified there. Afterwards, at another session of the committee, he again appeared, and was again examined and cross-examined before the same tribunal on another day. Did you ever hear in any court of justice the theory, when a man has been sworn as a witness on one day, that you needed to swear him again on the next day in the same case?

Mr. Manager Palmer said:

The offer is to prove that Judge Swayne voluntarily appeared before a subcommittee of the House Judiciary Committee and made a voluntary statement in his own defense. He was not a witness; he was not summoned; and his statement was entirely voluntary. * * * On this occasion he read a typewritten statement, which occupies thirteen pages of the record. After his statement was read certain questions were asked him based on allegations that were made in his statement; and the questions that were asked him, that we now offer to prove, were based on suggestions made in his statement. The questions were asked by members of the committee to clear up some things that Judge Swayne had stated in his written statement. Now, we offer this testimony in entire good faith. * * * I say we offer this testimony in entire good faith. We are not pettifogging; we are not endeavoring to get before the Senate testimony which is not testimony; but we offer it because we believe it is testimony, because it is competent testimony, and because it is the admission of the respondent here, a judge of a Federal court, who, in his own defense, made a voluntary statement, and he ought not to be objecting to it now here, as we believe. * * * No, sir; it was not under oath. To state the fact exactly as it is, Judge Swayne appeared before the committee, and this conversation occurred. On a previous occasion this testimony was given, or at least this statement was made on the last hearing that was had. On a previous hearing, several months before, Judge Swayne appeared and raised some question about some testimony that was given as to his residence. It was said to him by a member of the committee, "There is one man in the United States who knows all about this subject," and Judge Swayne said: "Do you mean me?" The committeeman said: "Yes; I mean you." Judge Swayne said: "Do you wish to have me sworn?" It was said to him: "That is entirely voluntarily with you; you can be sworn if you desire to be sworn." Then he held up his hand, and was sworn. That was at the hearing some months before. At the last hearing he appeared and read this typewritten statement, which, I say, occupies thirteen pages of the record, and that statement led to the inquiry made by a committeeman, which elicited the information which we now ask to give

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here. He was not sworn at that time. He had been sworn some months before on a different proposition at his own request or on his own volition.

Now, the reason for this statute is plain. It protects a witness who is compelled to testify to matters which might criminate him. In this case the offer is to show that Judge Swayne appeared voluntarily before the committee—and that is admitted—that he was not a witness summoned to appear, but that he appeared voluntarily, and made a statement and argument in his own defense. Something he said in that argument attracted the attention of a member of the committee who interrogated him and elicited the matter contained in the offer.

The statement is evidence here, first, because this is not a criminal proceeding against the respondent. If he has committed any crime, he can be punished for it in another proceeding. This is a proceeding in which, if Judge Swayne were convicted, he would not be punished as for a crime, but the extent of the punishment would be removal from office. It is a proceeding calculated to keep the judiciary unsullied and pure. It is the only method by which a judge who violates the tenure on which his office is held can be removed. His commission runs that he is to hold this office "during good behavior;" and the only tribunal on earth in which that question can be settled is this august tribunal.

We are here to ascertain whether Judge Swayne has behaved himself well, and whether he is fit to hold this office. This is not a criminal trial; it is not a criminal prosecution; it is not followed by a sentence of any court. All that you can do under the Constitution is to deprive him of his office. If he has committed any offense the Constitution provides that he can be tried for that in another proceeding, and punished if he is found guilty.

The second reason why this is evidence is because he was not summoned to testify before the House committee, but appeared voluntarily to make a statement in his own defense. * * * Mr. President, I wish to call attention to the section of the Constitution of the United States under which this proceeding is had. I said that this was not a criminal prosecution. Did anybody ever hear that a man could be twice tried and convicted for the same offense? If the first trial is a criminal prosecution, then, of course, he could not be tried and convicted again. The provision of the Constitution is this:

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

Now, I say that is an amazing proposition that this judge who appeared and made a voluntary statement in his own defense should be objecting here now on the ground that it might incriminate him.

The Presiding Officer [106] ruled:

The general proposition that the admissions of a defendant may be proved does not seem to the Presiding Officer to apply to this case. The statute is that—

"No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony."

Now, without deciding technically whether this is testimony which was given by a witness before a committee, or whether it is proposed to use it in a criminal proceeding, or in a court, the Presiding Officer thinks that the intention of the statute is such as to make this evidence inadmissible.

Mr. Joseph W. Bailey, a Senator from Texas, asked that the question be submitted to the Senate.

Mr. Bailey said:

If the court please, section 103 of the Revised Statutes provides that—

"No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." (See sec. 859.)

[106] Orville H. Platt, of Connecticut, Presiding Officer.

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Plainly the purpose of that statute was to enable the committees of either House, or either House itself, to compel the attendance and the testimony of any witness, and it provides, contrary to the rule of law not obtaining in the courts, that the witness shall not be permitted to decline to testify upon the ground that it might disgrace him or tend to render infamous. Having deprived him of the privilege which he would enjoy before the courts of this country, and having compelled him to testify before its committees, even to his own infamy or disgrace, Congress very wisely then provided that such testimony should not be adduced against him in any criminal proceeding in any court.

But, Mr. President, this is not a criminal proceeding within that statute, and this, in my opinion, is not a court within the meaning of that statute. The Constitution may seem to contemplate that we shall sit as a court when we try the President, because it provides that the Chief Justice of the United States shall preside at such a trial. Whether that was intended, as has been suggested by some, to protect the President against the ruling of the Vice-President, who might succeed to the Presidency in the event of the President's conviction and removal, or whether it was intended, as has been suggested by others, to secure a more certain and a more correct interpretation of the law, I do not undertake at this time to decide.

My own opinion is that the reason which prevailed upon the framers of the Constitution to provide that the Chief Justice shall preside over the Senate when it tries the President on impeachment charges was that the Vice-President might be suspected of having a deep and peculiar personal interest in the result of such a trial. But whether one or the other was the reason, it can not be successfully contended that this is a court within the meaning of section 859, or if it shall be held that this is a court, then it can not be contended that this is a criminal proceeding within that section.

The very provision of the Constitution under which we are proceeding negatives the idea that this is a criminal action, because it expressly provides that no matter what our judgment may be, it only excludes the incumbent against whom it may be pronounced from the honorable office which he holds and it leaves to the ordinary administration of the criminal jurisprudence of the country the punishment for his criminal acts. * * * Mr. President, a judge, in my opinion, may be impeached without being guilty of a crime. He holds his office by a different tenure from that under which other civil officers of the Government enjoy. He holds his office during good behavior, and more than one of the charges in this very case are not a crime. No penalty is denounced against the violation of that provision of the statute which provides that a judge shall reside in the district for which he is appointed, and that his failure to do so shall be a high misdemeanor.

That term is new in legal vernacular. I know of no law books which furnish a distinction between a misdemeanor and a high misdemeanor. Certainly the Constitution does not. Congress has not seen fit to affix a penalty of any criminal nature to this very provision itself, and obviously the whole purpose that Congress had in mind when it declared that a failure to reside in the district for which the judge had been appointed was a high misdemeanor, was that his failure to do so should be an impeachable offense.

I put this case to the court and all the honorable members of it. Suppose there should be nothing before this body but the naked question, Does the honorable judge reside in his district? The law says that if he does not, he is guilty of a high misdemeanor. Does any member of the court doubt that if counsel for the respondent or the respondent himself were to rise in this court and say, "I do not reside in my district," there would be the slightest hesitancy in finding him guilty on that charge? Yet, sir, that charge is not a crime, and no Senator will contend that he could be prosecuted in the courts and punished for his failure to reside in his district. It is declared by law, it is true, to be a high misdemeanor, but it is not a crime, because there is no penalty attached to it by the law. Again, sir, suppose a judge should arbitrarily and maliciously disbar an attorney, does any Senator doubt that he could be, and ought to be impeached? And yet, sir, there is no criminl statute in that behalf provided.

The respondent was not a witness, within the statute, when examined before the committee of the House. As has well been suggested by my learned brother near me, whenever a party to a proceeding voluntarily takes the stand, he must be presumed to know the nature of it, and when he volunteers his testimony everything he says can be used. There are States under whose system of criminal jurisprudence the defendant himself may testify. He can not be called by the State; he can not be compelled to take the witness stand in his own behalf, and

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if he fails or refuses to do so it is error, and reversible error, for the prosecuting attorney to refer to that fact. But when the accused does take the witness stand in his own behalf, then he is not simply permitted to tesify to what he thinks may be to his own benefit. He can be cross-examined, and all he says must be received and considered by the jury as testimony in the case.

When the respondent in this case voluntarily appeared before a committee of the House, with a full knowledge of the nature of its inquiry, and proceeded to take any of the facts, it was within the power and duty of that committee to interrogate him as to all the facts, and when he had made his statement there it does not lie with him to claim immunity under this statute.

I believe that the protection afforded by section 859 was made necessary and proper by section 103.

Having deprived the witness of a privilege as ancient almost as courts of justice, it was just and proper that he should not be exposed to prosecution and conviction upon his own testimony, which he had been compelled to give.

I do believe, further, that this is a court within the meaning of that statute. I am sure that this is not a criminal proceeding within the meaning of the statute, because the respondent might be found guilty of a charge that would terminate his office, although he were guilty of no crime.

I am further sure that the respondent in delivering his testimony before the committee of the House was not a witness within the reason or the protection of the statute, and I am still more certain that if he shall be deemed a witness he must be treated as a witness who came voluntarily to testify and whose testimony may be used against him.

Further discussion having been prevented by reference to the rules, the Presiding Officer put the question: "Is the evidence admissible?" and there appeared yeas 28, nays 45. So the evidence was not admitted.

On February 16, 1905,[107] as the managers were about to conclude the presentation of testimony, Mr. Manager David A. De Armond, of Missouri, referred again to the subject of the respondent's statements before the House committee, and suggested a reconsideration of the former decision of the Senate:

Mr. President, if it can be shown, and it appears of record, so that the showing is not difficult if it exists, that Judge Swayne made any statement before the House committee before the oath was administered to him by that committee as a witness, we shall interpose no objection to such statement. But we do object to any statement that he made before that committee after he was sworn as a witness. * * * I do not desire to add anything to the argument I made the other day on this same question, except to call the attention of the Senate to one provision of the Constitution of the United States. It was urged here the other day that this is not a criminal proceeding, and that Judge Swayne is not charged with or being tried for a crime. I wish simply to call attention to a section of the Constitution, it being the last portion of section 2 of Article III. I read:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

On motion of Mr. Joseph W. Bailey, a Senator from Texas, and by a vote of yeas 53, nays 18, the doors were closed for consideration of the admissibility of the evidence heretofore ruled out.

On February 20[108] the Presiding Officer announced in the Senate sitting for the trial:

Before the reading of the Journal the Presiding Officer will announce that at the last session of the Senate in the trial of the impeachment the question of evidence was decided, namely, the proposal of the managers to introduce statements by Judge Swayne made before the committee of the House of Representatives, and it was decided that such statements were inadmissible. The vote by which it was decided will appear upon the reading of the Journal.

The Journal being read, it appeared that on the question—

Are the statements made by Judge Swayne before the committee of the House of Representatives admissible as evidence?

it was determined in the negative—yeas 29, nays 47.

[107] Record, pp. 2720, 2721.
[108] Record, p. 2899.

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2271. In proving the contents of lost letters the Senate, in the Belknap trial, permitted the witness to be interrogated generally as to the import of a series of letters.

Instance of a ruling by the President pro tempore on a question of evidence during an impeachment trial.

On July 10, 1876,[109] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh was called as a witness for the United States, and was questioned as to sums of money which he had sent to the respondent, and as to letters that had passed between them. He testified that he had destroyed all letters and telegrams, although he had received such from the respondent, directing how the money should be forwarded. After this testimony Mr. Manager John A. McMahon said to the counsel for the respondent:

Gentlemen, we have served a notice upon you to produce the letters which have passed between these parties, and, of course, we are ready now to receive them, or to offer evidence of their contents.

The notice was read as follows:

All letters, telegrams, and communications from said Caleb P. Marsh to you in regard to the appointment of post trader at Fort Sill or elsewhere.

All letters from said Marsh to you concerning the management, conduct, or removal of the post trader at Fort Sill.

All letters or telegrams from said Marsh to you in any way connected with the forwarding to you of money, certificates of deposits, drafts, etc.

All letter from said Marsh to you informing you of the state of accounts between him and yourself, particularly the letter informing him of a change in the amount of the annual payment to be made to you by him some time in the spring of 1872.

The time covered by this notice is from June 1, 1870, to March 2, 1876. The dates more particularly referred to are those specified in the seventeenth specification set forth in the fourth article of the impeachment articles filed against you.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

This notice, as far as it calls for letters touching the management of affairs at Fort Sill, calls for what were official letters, and may be found at the War Department. We have no other letters called for by the notice.

Thereupon Mr. Manager McMahon proceeded to ask questions to elicit proof as to the contents of the letters from witness to respondent, finally asking:

Now, give us the contents, as near as you can remember, or the substance, of one of these letters, without the date?

To this Mr. Carpenter objected, saying:

The rule is perfectly well settled that if an instrument is called for and not produced they may prove the contents of it. There is no doubt about that; but to ask the witness what was the general substance of letters without regard to date is not proving any instrument whatever. I deny that you can take a witness up here and pull a drag-net over the correspondence of business men for years and ask "what was the general purport of your correspondence?" That will not do. That is too indefinite. They will have to introduce the particular letter, and if they do not have it they must account for its loss, either by them or by us, and they may then prove the contents of that particular paper; but having shown that a particular paper is lost they can not ask the witness upon the general tenor of all these letters without regard to their date. When the question was put distinctly to this witness as to what were the contents of the

[109] First session Forty-fourth Congress, Senate Journal, p. 968; Record of trial, pp. 220–222.

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letter which accompanied the first remittance, he said he did not remember. Now, if there is any other particular letter which they can locate in the mind of the witness and prove by him its contents, that of course is not objected to; but the question, "what is the general substance of letters," without regard to their dates, is not proving a particular paper; it is proving at large what was the substance of a general correspondence. That can not be done. You must prove it by introducing every letter by itself. If you have not got the letter, then you must account for its loss and prove its contents, not by proving what was the general tenor of 40 papers. It is for the court to say what the general tenor of them is, after they know each letter, and we are to have the substance of each letter as near as the witness can give it.

Mr. Manager McMahon's argument was:

What we desire to prove is this: We may call his attention to the particular date, but we go further and ask, Was there a general form in which you sent them, or was there any particular letter of which you may remember the substance? The idea is that we have got to go through these 14 different occasions when money was sent, and if he does not remember the contents of a particular letter, therefore, it is not competent to testify to the contents of all of them as to his best impression! I understand that the rules of evidence are based upon a knowledge of human nature, upon a knowledge of the infirmities of human nature, and that a witness who has transacted business of this kind, when the documents are in the possession of the defendant, when he undertakes to state here the substance of their contents, is entitled to state it without saying that it was the contents of the letter of the 1st of November or the 6th of October or the 9th of October, 1874. I think I have said all upon this question that the occasion demands.

The President pro tempore having submitted the question to the Senate, it was decided without division that the interrogatory should be admitted.

The witness having, in response to the question, stated the general tenor of one of these letters, this question was asked:

Q. (By Mr. Manager McMahon.) After you had dispatched a letter like that, what letter would you get in return? Give us the contents of one of his letters that you can remember.

Mr. Carpenter said:

I want formally to make the same objection. I suppose, of course, it will be overruled, but I want to make the same point here as upon the former question.

The President pro tempore [110] said:

The Chair will take it as the sense of the Senate that the objection is overruled.

The question having been answered, another question was asked:

Q. (By Mr. Manager McMahon.) State whether, after shipping the money to him by express, you informed him of that fact; and if so, how.

Mr. Carpenter having objected, the President pro tempore submitted the question to the Senate.

Mr. Simon Cameron, a Senator from Pennsylvania, demanded the yeas and nays, which were refused.

Thereupon, without division, the Senate decided the evidence admissible.

Witness having stated that he sent the express receipt by mail when he sent the remittance, Mr. Manager McMahon asked:

State whether you received any reply; and if so, in what shape.

Mr. Carpenter, having ascertained that the question did not relate to a specific transaction, objected.

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[110] T. W. Ferry, of Michigan, President pro tempore.

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The Senate admitted the question.

Later Mr. Manager McMahon asked:

When you inclosed one of these certificates of deposit to him, state what was the substance of the letter which you did send to him accompanying the certificate.

Mr. Carpenter having objected unless a particular certificate was specified, the President pro tempore said:

The Chair overrules the objection. The witness will answer the question.

Soon after Mr. Manager McMahon asked: [111]

When you delivered the money to him [the respondent] you stated that you at first delivered him $1,500 quarterly, and after the lapse of one and a half or two years $1,500 semiannually. State now whether you failed to deliver to him exactly at the time the amount that you were to deliver to him; and if so, why.

Mr. Carpenter said:

I want to object to that question, Mr. President. It is as disagreeable to me to seem to be captious about objections as it is disagreeable to the Senate to have me captious, but the insidious manner in which the facts of this case are sought to be kept out of view, while some deductions and conclusions are forced in as their substitute, is, although very ingenious and very artful and very gradual, yet perfectly apparent. We ought to have the questions so put to the witness that he will understand and that we shall understand precisely what transaction is being referred to. Now, you call his attention to no particular transaction at all; you do not name a place and do not fix a date; you do not determine any particular transaction; and yet you are trying in that way to float him over all of them, when in the only instance in which you put the question direct you did not get what you wanted to get, and I suppose that is the reason why the manager is now seeking to generalize. But it is an improper way, as I believe, to lead this witness. The manager knows perfectly well how to put the proper questions in a direct examination, not fix him between this boulder and that rock, and lead him from step to step and over gulch and gulf, as he is doing by this method of examination. This is too big a thing to be played on a small mere game. Let us have it out; let us have the facts. This is too big a court to be trifled with by that method of examination. Here is a man put on the stand to swear to we all know what. Why do not they let him swear to it? Why do not they put him right straight forward and let us have these facts in their natural order, and not dragged out one after the other in this indirect and, as I think, improper way?

Mr. Manager McMahon said:

Mr. President, it is a matter of great deprivation to the House of Representatives, no doubt, that the able gentleman (and I say it in all seriousness and earnestness) does not sit here to conduct the case of the Government for it, but that is one of those accidents which we can not prevent, for the simple reason that he fails to be a Member of the House. The House has selected us to try this case, and while we concede to the gentleman (and we concede it honestly, not in any other except the fairest meaning) great ability in his profession and a full understanding of all the points of law and a full knowledge of all the details of practice and a full aptitude in all the details of nisi prius trials, yet we most respectfully submit to the Senate that we, however humble, appear here trying this case on our side, and if the gentleman will but possess his soul in patience for a little while the time will come when he can double this witness up all over four or five times with his unusual skill, and he can bring out all this truth that we are now so insidiously suppressing. He then make it appear that his client is innocent, and that all this that we are introducing as testimony has nothing whatever to do with this case. A little patience now, a little of that which we have exercised, and the time will come when all these material facts in this case, all this hidden truth, can be brought out in the full sunlight that we have had in the last three or four days. Now,

[111] Senate Journal, p. 969; Record of trial, pp. 223, 224.

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we propose, and we must be allowed that privilege, to put the questions to the witness. I never knew that right interfered with before.

The Senate, without division, decided that the question should be put to the witness.

2272. In the Johnson trial the Chief Justice was sustained in admitting as evidence the warrant and papers in a legal proceeding to which respondent was related, but not a party directly.—On April 13, 1868,[112] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. R. J. Meigs, clerk of the supreme court of the District of Columbia, was called on behalf of the respondent and testified that on February 22 he affixed the seal of the court to a warrant for the arrest of Lorenzo Thomas. The said Thomas was Adjutant-General of the Army and had been arrested on complaint of Edwin M. Stanton, Secretary of War, who made affidavit that Thomas had been appointed by respondent to take illegal possession of the office of Secretary of War.

The testimony as to the issuance of the warrant having been read, Mr. Henry Stanbery, of counsel for the President, proposed to introduce as evidence the warrant and affidavit on which the warrant was issued.

To this Mr. Manager Benjamin F. Butler objected.

I have the honor to object, Mr. President, to the warrant and affidavit of Mr. Stanton being received as evidence in this cause. I do not think Mr. Stanton can make testimony against the President by any affidavit that he can put in, or for him by any proceedings between him and Lorenzo Thomas. I do not think the warrant is relevant to this case in any form. The fact that Thomas was arrested has gone in, and that is all. To put in the affidavit upon which he was arrested certainly is putting in res inter alios. It is not a proceeding between Thomas and the President; but this is between Thomas and Stanton, and in no view is it either pertinent or relevant to this case or competent in any form, so far as I am instructed.

Mr. William M. Evarts, of counsel for the President, said:

Mr. Chief Justice and Senators, the arrest of General Thomas was brought into testimony by the managers and they argued, I believe in their opening, before they had proved it, that that was what prevented General Thomas using force to take possession of the War Office. We now propose to show what that arrest was in form and substance by the authentic documents of it, which are the warrant and the affidavit on which it was based. The affidavit, of course, does not prove the facts stated in it; but the proof of the affidavit shows the fact upon which, as a judicial foundation, the warrant proceeded. We then propose to follow the opening thus laid of this proceeding, by showing how it took place and how efforts were made on behalf of General Thomas by habeas corpus to raise the question for the determination of the Supreme Court of the United States in regard to this act.

* * * * * * *

It has already been put in proof by General Thomas that before he went to the court upon this arrest he saw the President and told him of his arrest, and the President immediately replied "that is as it should be;" or "that is as we wish it to be, the question in court." Now, I propose to show that this is the question that was in the courts, to wit, the question of the criminality of a person accused and his civil-tenure bill. And I then propose to sustain the answer of the President, and also the sincerity and substance of this his statement already in evidence, by showing that this proceeding, having been commenced as it was by Mr. Stanton against General Thomas, was immediately taken hold of as the speediest and most rapid mode, through a habeas corpus, in which the President

[112] Second session Fortieth Congress, Senate Journal, p. 893; Globe supplement, pp. 166–168.

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or the Attorney-General, or General Thomas acting in that behalf, would be the actor, in order to bring at once before this court, the supreme court of the District, the question of the validity of his arrest and confinement under an act claimed to be unconstitutional, with an immediate opportunity of appeal to the Supreme Court of the United States then in session, from which at once there could have been obtained a determination of the point.

At the conclusion of the argument the Chief Justice [113] said:

The Chief Justice thinks the affidavit upon which the arrest was made is competent testimony, as it relates to a transaction upon which Mr. Thomas has already been examined, and as it may be material to show the purpose of the President to resort to a court of law. He will be happy to put the question to the Senate if any Member desires it. [No Senator being heard to speak.] Read the affidavit.

But before the reading began, Mr. John Conness, a Senator from California, demanded that the question be put to the Senate. This being done, there appeared, yeas 34, nays 17. So the reading of the warrant and affidavit in evidence was permitted.

2273. On April 13, 1868,[114] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, R. J. Meigs, clerk of the supreme court of the District of Columbia, had testified as to the issuance of the warrant for the arrest of Lorenzo Thomas on the affidavit of Edwin M. Stanton, and the warrant and affidavit had been admitted as evidence.

Then Mr. Henry Stanbery, of counsel for the President, asked:

Have you got the docket entries as to the disposition of the case of The United States *v.* Lorenzo Thomas, and if so will you produce and read them?

Mr. Manager Benjamin F. Butler objected to the evidence as incompetent.

The Chief Justice [115] said:

The Chief Justice thinks that this is a part of the same transaction, and is competent evidence; but he will put the question to the Senate if any Senator desires it. [After a pause.] The witness will answer the question.

2274. Instance in the Belknap trial wherein a document not pertinent on its face was admitted to prove the negative of a pertinent proposition.—On July 8, 1876, in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. John A. McMahon, of the managers on the part of the House of Representatives, proposed the introduction as evidence of this letter, as bearing on the charge that the respondent had a corrupt arrangement with Marsh and Evans, who were interested in the past tradership at Fort Sill:

General Orders, No. 89.] WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
"*Washington, October 12, 1872.*

The opinion of the Acting Attorney-General upon the following questions is published for the information and guidance of all concerned:

"DEPARTMENT OF JUSTICE,
"*Washington, October 3, 1872.*

"SIR: I have duly considered the questions which you ask the Attorney-General in your letter of the 11th instant, and which are as follows:

"Where persons such as post traders, contractors, and others have been allowed by proper authority to erect buildings to facilitate their business upon a

[113] Salmon P. Chase, of Ohio, Chief Justice.
[114] Second session Fortieth Congress, Senate Journal, p. 895; Globe supplement, pp. 173, 174.
[115] First session Forty-fourth Congress, Record of trial, p. 208.

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military reserve, with no restriction as to the term during which they shall be allowed to remain—

"1. Are such buildings, after the removal of the trader, contractor, or other person from the reserve, still his personal estate, and as such has he the right to dispose of them by rent, lease, or sale to other persons?

"2. Does not such property become part of the realty after the appointment of a trader is revoked or a contractor has fulfilled his contract, or any event happens which dissolves their business connection with the reserve?

"By the order of the Secretary of War of June 17, 1871 (a copy of which you inclose to me), it is provided that 'post traders appointed under the authority given by the act of July 15, 1870, will be furnished with a letter of appointment from the Secretary of War, indicating the post to which they are appointed.'

"They will be permitted to erect buildings for the purpose of carrying on their business upon such part of the military reservation or post to which they may be assigned as the commanding officer may direct, such buildings to be within convenient reach of the garrison.

"They will be allowed the exclusive privilege of trade upon the military reserve to which they are appointed, and no other person will be allowed to trade, peddle, or sell goods, by sample or otherwise, within the limits of the reserve.

"They are under military protection and control as camp followers.

"Buildings erected by post traders on a military reserve, in conformity to this order, are erected for the mutual benefit of the Government and the trader, and are not to be regarded as buildings would be erected by trespassers, or even by tenants under leases, in which no provision is made therefor; but they are erected under a license from the Government and for the mutual benefit of both parties. Under these circumstances I am of opinion that by the proper construction of the license these buildings were not intended to become a part of the realty after their erection; but were to continue the property of the traders, and, lest therefore when a trader is removed from his post, I have no doubt that he has a right to remove the building from the place where it was erected; and that when removed he can dispose of the materials as his own property. But it is very clear that the license to erect such buildings is a purely personal one, and is granted for one purpose only. Therefore, under such licenses, the person so erecting the building would have no right to rent or lease the same or even to sell it to another post trader without permission of the military authorities, but his rights are confined solely to that of removing the building from the reserve. Undoubtedly the property in such a building might, with the approval of the commanding officer, be transferred to another post trader, and such permission would have the same force as a license to a new post trader to erect such a building at that spot.

"I return you the papers inclosed.

"I have the honor to be, sir, your very obedient servant,

"CLEMENT HUGH HILL,
"*Acting Attorney-General.*

"Hon WILLIAM W. BELKNAP,
"*Secretary of War.*"

Mr. Matt. H. Carpenter, of counsel for the respondent, objected to the letter as without relevancy and having no possible bearing on the case.

Mr. Manager McMahon said:

We have asked the Adjutant-General for a copy of every order that has been issued since the Grierson complaint in regard to post traders for the purpose of proving a negative, but a very important negative in this case, and that is for the purpose of proving that every order that the Secretary of War issued, by a coincidence of good luck, failed to hit the case of Marsh and Evans.

The President pro tempore having submitted the question to the Senate, the evidence was admitted without division.

2275. In the Belknap trial testimony cumulative as to the fact but not as to the intent of respondent was admitted.—On July 8, 1876,[116] in the Senate sitting for the impeachment trial of William W.

[116] First session Forty-fourth Congress, Senate Journal, p. 965, Record of trial, pp. 204–206.

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Belknap, late Secretary of War, Mr. Manager John A. McMahon proposed the introduction as evidence of certain letters wherein a complaint had been made through the Solicitor of the Treasury that Evans, the post trader at Fort Sill, was clandestinely selling spirituous liquors, and the following letters in reply thereto:

WAR DEPARTMENT,
Washington City, November 2, 1871.

SIR: I have the honor to reply to your letter of the 28th ultimo on the subject of the illegal introduction of spirituous liquors, etc., into the Indian country by Evans & Co., and other parties, that previous to the 28th ultimo, on which date Evans, post trader at Fort Sill, was authorized to take to that post monthly ten gallons of brandy and ten gallons of whisky for the use of the officers there, no permit had been given him or the other parties referred to to introduce any liquors into that country.

Very respectfully, etc.,

W. W. B.,
Secretary of War.

The SOLICITOR OF THE TREASURY DEPARTMENT.

WAR DEPARTMENT, *November 8, 1871.*

SIR: In further response to your letter of the 28th ultimo on the subject of the alleged illegal introduction of liquors, etc., into the Indian country by certain persons, among others Evans & Co., of Fort Sill. I have the honor to inform you that Mr. John S. Evans, post trader at Fort Sill, through his friends, denies having taken liquor into the Indian country without authority. Mr. Evans was appointed to the post tradership on October 10, 1870, and holds it in his own name and not in that of Evans & Co., and no complaint has ever been made against him by the military authorities at Fort Sill, he having been regarded a good and law-abiding business man.

I therefore request that no proceedings be commenced against him without a thorough investigation of the charges that he has been engaged in such practices shows they were well founded.

Very respectfully, etc.,

W. W. BELKNAP,
Secretary of War.

To the SOLICITOR OF THE TREASURY.

The respondent was charged in the articles of impeachment with having appointed Evans corruptly and with sharing in connection with one Marsh in a tribute paid by Evans in consideration of the appointment.

Mr. Matt. H. Carpenter, of counsel for the respondent, said:

I object to all that proof. It does not go, so far as I can ascertain, to sustain any charge made in these articles at all, nor is it evidence of anything necessary for them to prove so far as I can see. They certainly do not state any reason why this should be received. One of the managers says he wants to prove by it that Evans was there acting as post trader and that Belknap knew it. As they have shown the fact that Belknap appointed him, it is pretty good evidence that he knew that Evans was appointed. There is no question made here that Belknap did not know that he was the post trader there; not the slightest. * * * You have proved by the only testimony which can prove it—to wit, the record of his appointment—that he was appointed. After you have proved the record of a judgment in a court of record, you cannot call witnesses to prove that the judgment was rendered, because that is cumulative. You have introduced conclusive evidence, and I have said to you that we do not deny it; we make no point upon it. Of course the Secretary knew that Evans was post trader.

Mr. Manager McMahon said:

The letters which we now offer by way of introduction to subsequent letters are letters which make certain specific charges against the post trader, John S. Evans. The theory of this prosecution is, and up to this point tolerably well sustained, that John S. Evans was appointed through the influence of Caleb P. Marsh and in pursuance of a corrupt bargain between them, the profits of which

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were equally divided between Marsh and the Secretary of War; that the Secretary of War did actually and personally receive his share of the fruits of this arrangement no man who has any regard for testimony can doubt. The great question for this tribunal is whether he received it knowingly, under such circumstances that any officer of honesty and integrity ought to have known where this money was coming from.

The particular point, therefore, to be investigated is the conduct of the Secretary of War. Whenever this particular post trader is affected, from whom he is receiving his gains, the particular point is to discover how the Secretary of War acts. What he may say is very direct and positive testimony, but it is not any more direct and positive than what he may do. * * * We have introduced conclusive evidence that John S. Evans was, in fact, the post trader, but whether the Secretary of War had forgotten the fact in the multitude of his different appointments is another important fact in this case which we propose to show had not occurred; that he had not forgotten that John S. Evans was the post trader, but, on the contrary, that he was receiving testimony as to John S. Evan's good character, supporting and sustaining John S. Evans all along.

The President pro tempore submitted the question to the Senate, who decided without division that the evidence should be admitted.

2276. The Senate in the Belknap trial declined to admit evidence of a fact occurring after respondent had ceased to hold the civil office.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On July 8, 1876,[117] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, E. D. Townshend, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent, when the latter proposed to offer in evidence a certain circular general order, issued March 7, 1876, from the War Department, and sent to every post in the United States directing the officers to examine whether the post traders were satisfactory; and, if not, to state that fact or to have them removed; and that in pursuance of the order, at Fort Sill on the 11th of April, 1876, there was a meeting of the officers and every one of them recommended the reappointment of Mr. Evans.

Mr. Manager William P. Lynde said:

We object to the introduction of that circular in evidence. It bears date, I think, 7th of March, after the resignation of Mr. Belknap, and has nothing whatever to do with the case now before the court so far as we can see. * * * It seems that this investigation was not had until Mr. Belknap had sent in his resignation and vacated the office of Secretary of War. He had made the appointment previously, it is true, on the recommendation of the officers at Fort Sill, when he was Secretary of War; but he refused to make it until Mr. Marsh threw in his interest and influence with the Secretary of War, who had informed Mr. Evans that he had already promised this appointment to Mr. Marsh. That the officers at Fort Sill found no fault with Mr. Evans and excused him of the high charges which he made for the goods which he sold to the officers and soldiers on the ground that he was paying $12,000 a year bonus we are informed by the letters of the commanding officers at the post and by the other evidence we have introduced in the trial. Therefore that these same officers should, subsequent to the resignation of the Secretary of War, when this matter was under investigation and when Mr. Evans was no longer called upon to pay this bonus of $12,000, have sufficient confidence in his integrity to recommend his continuance in that position, makes nothing in favor of the accused in this case. We therefore claim that it has no pertinency to the issue before the Senate, and ask that it may be excluded.

[117] First session Forty-fourth Congress, Senate Journal, p. 965; Record of trial, pp. 209–211.

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Mr. Montgomery Blair, of counsel for the respondent, said:

Mr. President and Senators, the court will observe that there are two theories here; one by the prosecution and one by the defense, and they recur at every stage of this case. Yesterday we had this battle with the managers, they assuming that we knew of these arrangements, of the existence of this contract, and were receiving knowingly this money. Of course they think that theory is true, and of course they think there is no other theory in the case. But there is another which we mean to make good to this court, and it is that we knew nothing of the consideration whatever; that this appointment was made in perfect good faith; that so far as we knew the law was being executed, and when failure of its execution was called to our attention we got the advice of our officers, those who were most familiar with this case, and got their remedies and applied them. They would think the argument to be on their side that we ought to have immediately removed this man, broken up his establishment, and turned him out, as the President did when the fact was finally brought to his attention and it was published that this contract existed. Let the Senate assume, as we infer they will assume, that the Secretary of War knew nothing of this transaction between these other parties; and that this man executed his duties faithfully. That he did execute them faithfully and that he was a good officer, we think is proved by the unanimous recommendation of the officers and soldiers at this post. We want now to show to the court that this officer, notwithstanding all the charges which were made, was recognized as a good and proper officer, and did his duty so satisfactorily that every officer at the post recommended his reappointment. We think this competent proof. We think this proper to go before the Senate as a circumstance to weigh in their judgment upon this case.

The President pro tempore having submitted the question, "Shall the circular be admitted?" the question was determined in the negative without division.

Thereupon Mr. Carpenter offered the recommendation made by the council of administration, which convened at Fort Sill on March 7, 1876.

Mr. Manager John A. McMahon objected.

The President pro tempore [118] said: [119]

On the same principle decided by the Senate, the Chair sustains the objection, the paper being subsequent to the resignation of the Secretary of War. * * * The Chair * * * decided it on the principle that it was subsequent to the date of resignation, and on that the Chair ruled. The Chair will, however, submit the question to the Senate, if desired, Shall this paper be admitted?

The question was determined in the negative without division.

2277. Judge Swayne being charged with submitting false certificates of expenses, evidence tending to show that other judges had submitted similar certificates was excluded.

Letters from other judges stating their construction of the law as to expenses were not admitted in behalf of Judge Swayne, charged with submitting false certificates.

A statement signed by the Secretary of the Treasury, but not under seal, summarizing the contents of official documents, was objected to as evidence in the Swayne trial.

Objection that new matter in respondent's answer, not responsive to any charge in the articles, should not lay a foundation for the introduction of evidence.

On February 23, 1905,[120] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, in the course of the introduction of testimony, made the following offer:

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[118] T. W. Ferry, of Michigan, President pro tempore.
[119] Record of trial, p. 211.
[120] Third session Fifty-eighth Congress, pp. 3169–3174, 3176.

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I now offer in evidence certified statements from the Treasury of the United States showing in detail the number of days in each year from April 1, 1895, down to March 31, 1903, during which the several circuit and district judges of the United States were attending court away from home or out of their districts, and showing the amount of expenses for travel and attendance to which each and all of them certified and received.

I make this offer as tending to show from an analysis of the certificates and accounts the contemporaneous judgment which has been placed upon the statute in question by the action of many of the judges of the courts of the United States, and also by the administrative officers of the Treasury Department.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, objected, saying:

I desire that it be noted on the record that what this paper purports to be, as stated in the caption, is this:

"Statement showing amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences, and amounts paid to United States district judges as expenses claimed while holding court out of their own said courts, being in the first circuit."

And then there is one for each of the other eight circuits. * * * To that I offer the objection, which I will ask the Secretary to read:

The Secretary read as follows:

First, It is not responsive to any allegation contained in any of the articles of impeachment.

Second. If the subject-matter of the offer in any way relates to averments contained in the answers of respondent to the first, second, and third articles of impeachment, nevertheless, the said averments are not responsive to any charge contained in the articles of impeachment and present no issue for determination in this cause.

Third. The offer of respondent is only to show that the judges named did receive for their expenses an amount equal to $10 a day in the aggregate, but does not include an offer to prove that they did not actually expend as much as, or more than, the amount charged by the honorable judges to the Government as their said expenses of travel and attendance in holding court, and the evidence is therefore immaterial and irrelevant.

Fourth. That it is not averred in the answer nor offered to prove that the respondent, either at the time of or prior to the alleged false certification of his expenses in 1897, had consulted or conferred with or taken the opinion or had knowledge of the action of any of the judges referred to in the offer.

Fifth. It is not competent for respondent, in his own defense, to prove the usage or practices of other judges in other courts, particularly as it is not offered to show that he had knowledge thereof.

Sixth. If respondent has been guilty, as charged, of falsely certifying his expenses and collecting upon his own certificate an excessive amount from the Government, it is no justification for him to show that he subsequently ascertained that others had been guilty of the same offense.

Seventh. The certificates offered from the Treasury Department are not under its seal as required by the statute to make them admissible in evidence.

Eighth. The statements offered are not copies of any official papers or records remaining in the Treasury Department, but consist of some figures and data purported to have been made up after the consideration of such papers and records. They do not purport to show the amounts of expenses certified by the judges named therein, nor whether they were more or less than $10 a day. They show merely the amounts alleged to have been paid in each instance, without stating whether the said amount was more or less than the amount certified by the judge to have been expended. They do not include the certificate of the judge nor the account of the marshal who paid him. They are partial and incomplete, and not authorized by any statute to be used as evidence.

Ninth. The offer contains an unwarranted insinuation that other judges have collected from the Government for expenses sums greater than they actually expended, but without showing or offering to show what amounts they actually did expend, or certified as having been expended, and if received, will necessitate the calling of all of the said judges, as a matter of justice to them and to all the people of the United States, for the purpose of rebutting the said insinuation contained in the offer.

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Mr. Manager Olmsted then said:

Mr. President, if I may be permitted to speak upon this point, there is nothing in any article of impeachment making any reference whatever to any Federal judge save only this respondent, who is himself charged in the first article with having in 1897 falsely certified to the amount of his expenses and received the money upon his said certificate. In his answer, after admitting that he did make that certificate, but denying in rather a vague way its falsity, he says, on page 27 of this record—it is the last paragraph on the page—

"respondent says that he is fortified and confirmed in his honest belief that the construction so placed by him, etc., was and is right * * * by the fact that he is informed"—

Now, in 1905. nine years after he made that certificate, he is informed—

"and verily believes, and as the records of the Treasury Department will show, that many of the circuit judges of the United States and district judges did the same thing."

That, I submit, Mr. President, is new matter, not responsive to anything in the charge and having no proper place in the respondent's answer, and evidence under it is inadmissible upon the ruling of the Presiding Officer and of the Senate made upon the 14th instant upon our offer to prove the inconvenience to suitors and counsel of the absence of the respondent from his district. It was ruled inadmissible. That evidence was responsive to new matter inserted in the answer of the respondent, but the answer itself in that particular was not responsive to any averment in the articles of impeachment.

I want, just at this point, Mr. President, to state that the honorable counsel for the respondent took us to task for making a written offer embracing an admission made by the respondent, to which they objected. He took us to task in terms of great indignation for trying to get before the Senate matter in an improper way. I call your attention to these three exhibits attached to their answer, and ask what words of condemnation are strong enough to apply to the introduction in that matter of what is intended to be evidence in advance of the hearing of the case for the purpose of influencing the court in its decision? Upon the ruling I have already cited, and upon every authority, this evidence would have to be rejected for that reason.

But next, Mr. President, the offer is only to show that the judges named in those papers did, in certain instances, receive for their expenses as much, or a sum equal to $10 for each day if divided by the number of days. But it is not offered to show—the statement offered does not even refer to the subject, and respondent makes no offer to show—that those judges, nor any of them, did not actually expend that sum, and this is, I say, a cowardly insinuation against honorable judges—the dragging of their names in the mire without any attempt to prove that they have been guilty of any offense whatever.

Of course, Mr. President, if a judge is holding court in New Orleans, where, as I know from very recent experience, people may reasonably expend a good deal more than $10, or in New York, or in Chicago, or in San Francisco, and if his expenses amounted to $12.50 to $15 a day, he could get not to exceed $10; and so, of course, this statement would show that what he got amounted to $10. That is the maximum fixed by the law, but it is not the slightest evidence that he did not expend the money. They do not offer to introduce the certificates showing what his actual expenses were. So I say, that, lacking that essential element, it is not evidence at all in this case.

It is not pretended that this respondent at the time of making his certificate in 1897 knew the opinion of or consulted any other judge in the United States.

In regard to the fifth objection, Mr. President, it is not competent for the respondent in his own defense to prove the usage or practice of other courts or other counties. I propose to submit a very high authority. In the celebrated trial of Prescott in Massachusetts, made notable by the eminent array of counsel and managers involved, Judge Prescott, the probate judge, entitled upon one side of the court to take fees, was charged with taking more than the law permitted him.

In one case the excess was $1.98, and in another article some $39 of excessive fees were involved, He was convicted upon both charges. He offered to prove the usage of other courts and other counties throughout the State for the purpose of showing his intent to have been an honest one and in accordance with the practice throughout the State. That offer was made by Mr. Samuel Hoar and supported by himself and Daniel Webster, but they were completely overthrown in their argument by Mr. Manager Shaw—the same Mr. Shaw who afterwards became chief justice of the supreme court of Massachusetts, and, in the opinion

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of many men, secured a place in the history of the jurisprudence of this country second only to that of Chief Justice Marshall. I ask that the court will hear the offer which was made by Mr. Hoar in that case:

The Secretary read as follows:

The counsel for the respondent read the motions when put into writing, as follows, viz:

"1. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties in this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute called the 'fee bill,' and fees paid therefor, and to show the usual amount of such fees.

"2. And now the counsel for the respondent move that, in order to rebut the charge of willful and corrupt misconduct, they may be permitted to prove that at the time of the respondent's appointment to office there did exist, and continually since has existed, in the probate offices of the several counties of this Commonwealth a practice according to which, in cases of application for administration, certain official papers are prepared and executed and certain official acts done and performed which are not particularly enumerated in the statute of the Commonwealth, commonly called the 'fee bill.'"

Mr. President, to make this as brief as possible, that offer having been elaborately argued by those eminent gentlemen, was rejected by a vote of more than 2 to 1. Judge Prescott was convicted and removed from office upon those two articles. If this respondent has been guilty of any offense it is no excuse for him to say that somebody else did the same thing in later years, and in some other court; and in any event his offer does not include anything tending to show improper conduct by any other judge.

But again, that paper is not offered under the seal of any Department. It is not so authenticated as to be admissible in evidence. It does not purport to be a copy of any record in any Department. It is simply a lot of figures made up by somebody purporting to have been abstracted or extracted from certain documents, we know not what. It certainly does not show that any other judge ever certified to $10 of expenses when his actual expenses were less.

Now, when we offered the three certificates showing Judge Swayne's certificates and the action thereon we were required by the honorable counsel for the respondent to put in the whole record, the marshal's account, the action of the Treasury Department—every paper on file. These papers which they offer are not evidence in any proceeding on earth and would not be received in any court in Christendom.

Mr. Anthony Higgins, of counsel for the respondent, said:

Mr. President, I must confess to my surprise at the last objection raised by the learned manager. It is true, I find, that the certificate to these statements is not attested by the seal of the Treasury Department, but it is signed by the Secretary of the Treasury; and the only effect of that objection would be to require us to have the seal put to this paper between this time and the next meeting of this body. I hardly suppose that the learned managers will stand on that. An objection which merely goes to the authentication and which does not dispute its genuineness, it seems to me, is hardly worthy of either this tribunal or this grave proceeding. Nor have I supposed that either side in the prosecution of this case would undertake to put unnecessary tasks upon the other or lengthen the proceedings.

The learned manager said that the counsel for the respondent had compelled the managers to put in evidence certain certificates of the judge when they put in their Treasury statements in support of the articles against Judge Swayne—the first, second, and third. We put no compulsion upon them that I remember. They took their own course, and a very proper course. They rely upon their allegation of the untruthfulness of the certificate, and of course they put in the certificate. It would have been open to us to have loaded up this record with all of these papers from the Treasury Department and to have brought the originals here to the extreme disturbance of the public business. But, as we supposed, contributing to the need of dispatch of the Senate under its present conditions, we have got a succinct statement which gives all the material facts; for, Mr. Presi-

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dent, behind the certificate here, as to every item, it is presumable, and there certainly is in the Treasury Department, certain other evidence. The course of proceeding in this case, as shown by the very certificate put in by the managers, is that at the end of a session of court held by a judge away from his home, at the circuit court of appeals, or away from his district in the district court, he presents his certificate to the marshal, stating the number of days and the amount of expenses, which he certifies to, and on that the marshal pays to him the amount and takes his receipt, which, under the form prescribed by the Department of Justice, is at the bottom of the certificate. A form of that was presented by my colleague only a few moments ago and admitted without objection.

That certificate is by the statute made the voucher upon which the marshal is reimbursed for his payment to the judge; and, as I shall call attention to, the statute requires that he shall be repaid—that he shall be allowed his account. The marshal then presents such item with the other items going to make up his account, his entire account, under the act of 1875, which we put in evidence here this afternoon, to the United States judge for that court. In the particular cases, we have an object lesson here in the certificate introduced by the managers in condemnation of Judge Swayne, that there the marshal of Texas in two instances presented that account before the local judge, Judge Bryant, who did not sit in two certain trials growing out of the failure of a bank because he was interested in the matter in some way, and Judge Swayne held two long trials, one in one year and the other in another year, and made these certificates.

Now, the marshal presented his account to Judge Bryant, and, under the statute, the United States attorney for that district was at that time required to be present and his presence to be noted upon the record. The marshal's account had to be sworn to. The judge's certificate is prescribed, and the statute prescribes that he shall approve or disapprove of that account, as shall be according to law and as may be just.

So you have now the act of the marshal in paying the judge, and the act of the local judge in approving the account in the presence of the district attorney, who is there when he approves it in order to protect the United States. All that happens in the very district where the expenditures are made and where the judge knows and the district attorney knows and the marshal knows, each of their own knowledge, as to what is the amount of expenses that would be involved in a residence there. The account then goes with the marshal's to the Department of Justice, under the terms of the act which will be printed in the Record to-morrow, and is there audited, in the first instance, by the Auditor of the Department of Justice. From there, after the lapse of sixty days, it goes to the Treasury Department and is audited by the Auditor for the State and other Departments. It is then subject to the disallowance of the Comptroller, either of his own motion or upon its being brought before him.

You have, therefore, Mr. President, in this case the act in succession of six executive officers in confirmation or disallowance of such accounts. These certificates show that there has not been a single account disallowed by all of these officers: that from the beginning to the end there has been no objection made under the terms of this statute to the construction placed upon it by Judge Swayne, namely, that the certificate under which the payments were made were those that allowed a certificate of $10 a day irrespective of the facts as to whether that amount was actually expended or not. * * * I ask the learned manager if this fraud, which is a fraud before this Senate, was not such a fraud when it was brought before Judge Bryant? If it is a fraud now, it was a fraud then; and was there anything that has been proved by these witnesses that Judge Bryant did not know of his own knowledge? Did he reside in Tyler? I do not care. If he did, he knew it because he lived there. Did he reside elsewhere? Then he had to go away from his home, though in his district, to be sure, when he held court in Tyler, and he knew what it cost him just as much as Judge Swayne knew. Did not the district attorney know it? Did not the marshal know it? And does the learned counsel pretend to say that because of the terms of this certificate, as prescribed by the acts of 1891 and 1896, if that was a crime, it was not the duty of that district attorney to present Judge Swayne to his grand jury and have him indicted: that it was not the duty of Judge Bryant to bring it to the attention of the district attorney: that it was not the duty of the marshal to protest? Is it possible that there is any fraud that can exist within the jurisdiction of the Auditor of the Department of Justice, of the Auditor of the Treasury Department, of the Comptroller of the Treasury that they can not unkennel and uncover, and that it is not their duty to do it?

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No, Mr. President, it can not be held in the face of that that any such construction could be put by them upon the act of 1891 and the act of 1896 as to these fees. They did not abandon their duty; they do not stand here as convicted of any such absence or lack of it. What they did do was to say, "We are concluded by the certificate because we can not go behind it; we are concluded by the certificate because the statute intended to make it an allowance when the judge certified it, irrespective of what the actual expenses were."

The Senate will perceive, Mr. President, therefore, that the admissibility of these certificates rest upon something else than the mere act of the circuit and district judges of the United States in their several and respective actions in the amounts they certified under this statute. It brings up as a ground of admissibility of these certificates the contemporary construction placed by the executive officers upon the certificates of the judges as made from time to time. The form in which we have presented it is compendious. It is stripped of every unnecessary matter of evidence, which would merely load it up with lumber. It is brought down to the naked skeleton of facts of what is vital; but it puts before the Senate all of the evidence, coupled with the acts of Congress, that is necessary, and is in no sense unfair to the managers, because it apprises them of everything that they might desire to know.

Mr. President, I had hoped that this discussion would be left to the final argument; and for my colleague and myself we are willing that that course should be pursued now. I would stop at once any further discussion of this subject and leave it until the final argument to complete then what I have already said, so as not to take up the time of the Senate; but that offer does not seem to meet with the views of the learned managers, and I am compelled, therefore, to go into the discussion of the case—I say of the case—as made now by this objection to our certificates.

What we contend, Mr. President, is that the proper construction of these acts of Congress of 1891 and 1896 as to judges holding court away from their homes or out of their districts, is the one placed upon it by Judge Swayne; and that is they were authorized to certify their expenses at $10 a day as an allowance or compensation for such services. I shall endeavor to be very brief. The act is:

"That any justice or judge who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides"—

And, mutatis mutandis, it is the same in the case of a district judge when he holds court out of his district—

"shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed $10 per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States."

The prior state of the law was that the Judge for such service was paid his actual expenses upon vouchers filed with his accounts. This will not be disputed, I presume, and I have assumed that there is no doubt as to the state of the law.

The true construction of these statutes is that Congress intended that a judge rendering such service should be paid $10 a day as an allowance for compensation for the service. That such is the true construction of the act will appear from its provisions, as shown by its language, and from the changes wrought thereby.

What is meant by "reasonable expenses" as used in the act? It was changed, Mr. President, from "actual expenses" and, therefore, presumably on its face does not mean "actual expenses." * * * Understand, Mr. President, I am arguing that this evidence is admissible because of the contemporary construction placed upon the statute by the officers, and that the statute is one which will bear construction, that it is open to construction. If it is not open to construction, if it is so clear, as the managers contend, that there is no doubt about it, in such case as that the authorities would not apply.

I must therefore make a case where it is apparent upon the face of the statute that it is doubtful and is uncertain, and hence I am compelled to go to the task if this question is to be determined on its merits. I regret it very much.

All the expenses must not merely be reasonable. The term "expenses incurred in travel" is easily defined, but it is difficult to place limits upon the term "attendance." Certainly it can reasonably be held to include (1) many expenses which might not be included under the word "actual" as construed by the accounting officers of the Government; (2) many expenses not incurred in attendance, but caused by attendance, and (3) the expenses are "not to exceed $10 a day."

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What light does this provision taken in connection with the words "for travel and attendance," throw upon the true construction of the words "reasonable expenses"? If a judge spends $13 one day and $7 another, shall he certify $20 for the two days, or only $10 for the one day and $7 for the other, and $17 in all? * * * I had very nearly completed, Mr. President, the argument I was submitting about the fact that contemporary construction applies because the statute itself is one that is loosely drawn. If the words "not to exceed $10 a day" are given a hard and fast interpretation, then it must be held to mean in the case to which I have already referred that it is not to exceed $10 for any one day, and so in this instance supposed the judge would certify $17 and loss $3. That is, if he expended $7 one day and $13 another, he could only certify to the $7 that he spent that day, and only $10 for the day he spent $13; but even the learned managers will not contend that that is the construction. Why? Because it is "for travel and attendance." Oh, they say, going about large districts, you have got to have traveling expenses, and a man will spend $20 or $30 a day sometimes in traveling and all that; but what becomes, then, of your construction that it is $10 from day to day?

But, again, Mr. President, did the word "reasonable" mean an amount not as fixed by the judge's certificate, but as determined by the personal habits of the judge, and, indeed, the state of his health, or the individual limitations of his physical needs?

But light is shed upon the meaning of the words "reasonable expenses," as used in the act, by its provisions fixing who shall determine what expenses are reasonable.

That takes me to what I have already submitted, namely, a contemporary construction, in which it is said that the amounts shall be allowed to the marshal in his accounts, and the sum on the certificate shall be paid by the marshal.

I assume, again, in answer to the suggestion of the Senator from Virginia [Mr. Daniel], that it is by no means clear. On the contrary, I think it is clearly the other way; that under this act the certificate of the judge is conclusive: that is, that it is irrebuttable and irreversible, because the statute makes it so. I submit to the Senate, as a most serious matter, that it is not irreversible where there is knowledge that a fraud has been committed; I can add nothing to what I have already said as to the case where the district attorney, the marshal, and the judge all have knowledge of it.

Mr. President, not detaining the Senate longer on that, I appeal to a case that is higher authority, I submit, than the one cited by the learned manager from an impeachment trial in Massachusetts; and that is the case of The United States *v.* Hill, where the doctrine of contemporary construction was applied to a statute nothing like as ambiguous and loosely drawn and uncertain as the one now under consideration here. That case was where a clerk of the district court of the United States for the district of Massachusetts had not returned in his emoluments his fees for naturalization papers.

Mr. Manager Olmsted concluded the argument—

In the first place, the act itself does not vest any power or discretion in Judge Bryant, or the marshal, or anybody else except the judge who certifies, for it provides:

"For reasonable expenses for travel and attendance of district judges directed to hold court outside of their districts, not to exceed $10 per day each, to be paid on written certificates of the judges, and such payment shall be allowed the marshal in settlement of his account with the United States."

Provided the judge certified to a sum not to exceed $10 a day, what marshal had the right to sit on the account? I would not like to be that marshal. He would have been in jail for contempt inside of thirty minutes. What judge had a right to pass upon it? What Treasury official had a right to pass upon it? No one. The judge makes a certificate as to his expenses; and if it does not exceed $10 a day it is paid without question, and must be.

Now, in this offer of evidence that is not a word about the amount expended by any other judge. It is not pretended in there that any judge did not expend every dollar for which he was reimbursed by the Government. There is not anything in there about the construction of any official. We do not know whether their expenses exceeded $10 or not. We only know they did not get more than $10 for any one day.

Now, one word more about the absence of the seal from that paper. Of course there is no seal on it, and it is not a question of waiting until to-morrow for them

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to get a seal on it. There can not be a seal on it. The Department can only put the seal on certified copies of papers or documents in the Department, which that is not. The act of Congress provides:

"Copies of any books, records, papers, or documents in any of the Executive Departments authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

That is not a copy of any record or any document or any book. It is some figures taken off by somebody, and we do not know who, and it simply shows the amounts paid to the judges therein named. There is no insinuation, except by counsel, that any one of these honorable judges charged or certified to any amount in excess of his actual expenses. There is nothing upon which to base the insinuation that a judge, having expended two or three or five dollars a day, certified that the expenses were $10 and collected the money from the Government.

On the same day, at the evening session, the question of the admissibility of the evidence was put by the Presiding Officer:[121]

The Presiding Officer thinks it becomes the duty of the Presiding Officer again to submit to the Senate the question with regard to the admission of evidence offered by counsel for respondent, which was submitted when a quorum of the Senate was not present, but when a quorum of the Senators sworn in the impeachment trial was present.

Counsel for the respondent offer in evidence certain statements of the Secretary of the Treasury, not under seal, purporting to show amounts paid to United States circuit judges as expenses claimed while attending circuit courts of appeals away from their residences and amounts paid to United States district judges as expenses claimed while holding court out of their own districts or while attending circuit courts of appeals away from their residences.

The question is, Shall the statement referred to be admitted in evidence? [Putting the question.] The "noes" appear to have it. The "noes" have it, and the statement is not admissible.[122]

Mr. Thurston then said:

Mr. President, I should like to have the Reporter read my two previous offers, which I desire to remake in the same terms I did before, and let the ruling be had upon them.

The Reporter read as follows:

Mr. THURSTON. Mr. President, we offer and ask to have incorporated in the record the opinion of the three circuit judges of one circuit, construing the law under which articles 1, 2, and 3 are framed. To be perfectly fair, I will state that this is in the shape of a letter, and has been written recently. On the question of offering it, I do not care to state to whom it is addressed or what judges sign it, but I offer it as an opinion of those judges on this question. The date of it is February 6, 1905.

The PRESIDING OFFICER. The Presiding Officer will exclude that paper.

Mr. THURSTON. I ask to have my second offer read.

The Reporter read as follows:

Mr. THURSTON. We offer in addition thereto similar opinions contained in letters of about the same date, signed by fifteen members of the Federal judiciary. They are all the same.

Mr. Manager PALMER. If they are similar——

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the same purpose that I offered the single letter.

The PRESIDING OFFICER. For what purpose?

Mr. THURSTON. For the purpose of showing the construction placed by these judges on the statute under which articles 1, 2, and 3 are framed.

The PRESIDING OFFICER. The Presiding Officer will exclude those papers.

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[121] Orville H. Platt, of Connecticut, Presiding Officer.

[122] A short time previously the yeas and nays had been taken on this question, showing 10 votes for admission and 34 for exclusion. This vote showed the absence of a quorum, and therefore was of no effect, except as indicating the division of opinion.

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2278. The Senate in the Belknap trial admitted evidence of an act which, in substance, amounted only to a refusal of respondent to confess culpability.—On July 8, 1876,[123] in the Senate sitting for the impeachment trial of William L. Belknap, late Secretary of War, E. D. Townshend, Adjutant-General of the Army, a witness for the United States, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent, and asked what the finding of the court-martial was in the case of Capt. George T. Robinson, of the Tenth Cavalry, and especially for a letter addressed by the said Robinson to W. W. Belknap, Secretary of War, and dated St. Louis Barracks, Mo., April 2, 1875. Mr. Carpenter explained the purpose of this evidence:

This man Robinson was, as I understand, court-martialed and sentenced by the court to be dismissed the service. He was at the St. Louis Barracks at the time; and after the finding by the court was sent on to Washington to be approved by the Secretary of War he wrote a letter to the Secretary substantially stating the allegations which are now made in these articles and by the testimony offered by the managers, and containing what we regard as a blackmailing appeal to the Secretary of War, that he must disapprove of the findings of that court or the writer would take steps to disclose what he says existed in regard to the tradership at Fort Sill. (It was for transactions in connection with this tradership that the respondent was impeached.) Thereupon General Belknap examined the papers in the case, found that the proceedings were regular, that the court was justified in its finding, and he approved the finding and cashiered the captain, and filed this of record.

Mr. Manager George F. Hoar objected to the evidence;

Mr. President, it seems to me that that act of the Secretary of War affords no evidence or presumption of his innocence. A blackmailing officer, himself convicted by court-martial, sent to the Secretary a certain threat and demanded certain action. If the Secretary of War had acceded to his demand, he would have put himself in the power of that officer forever; and the acceding to that demand or concealing the letter from the persons about him in the War Department would have been a confession of guilt. On the contrary, the exhibition of the letter and the going on with the court-martial was denial. All, therefore, that it is offered to show from the conduct of the Secretary of War is that in April, 1875, being charged with this offense, he denied it and did not confess it; in other words, he seeks to make evidence for himself by proving a denial, which is the substance of his own conduct.

The question on the admission of the paper being submitted to the Senate, they decided, yeas 21, nays 18, that it should be received. So the objection was overruled.

2279. In the Belknap trial the Senate, by a bare majority, admitted, to show intent, evidence that respondent had not inquired into newspaper charges reflecting on his subordinates.—On July 10, 1876,[124] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Whitelaw Reid, editor of the New York Tribune, was called as a witness for the United States, and examined as to a certain article which appeared in the Tribune as to the relations of the respondent with the post tradership at Fort Sill. In the course of the examination Mr. Manager John A. McMahon asked:

You can state now whether at any time, personally or by letter, the Secretary of War addressed you any communication to find out your authority for the statements in that article.

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[123] First session Forty-fourth Congress, Senate Journal, p. 966; Record of trial, pp. 212, 213.

[124] First session Forty-fourth Congress, Senate Journal, p. 967; Record of trial, pp. 218, 219.

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Mr. Matt H. Carpenter, of counsel for the respondent, objected that the testimony sought was wholly immaterial and irrelevant to the case.

Mr. Manager McMahon argued:

We do not know at this stage of the objection whether the witness will say "yes" or will say "no," and therefore the argument must be directed on the hypothesis that he may answer either way, and at this stage of the inquiry, if it is admissible in case he should answer either way, it is, of course, competent, and I think it is competent no matter how it may be answered. Why? Here is an article charging the existence of a grievance at Fort Sill, the payment of a tribute by one man to another for being kept in the place. We have already called Mr. Smalley, who wrote the article, and proved by him that no inquiry was made of him as to the authorship of that article, and that there was no general conversation had in regard to it. We now propose to go to the headquarters, to the fountain, and inquire whether anything was said to the editor of the paper in regard to this matter; and for this purpose I do not care what the answer may be. If the answer is "yes," we desire the communication, whatever it may have been; if the answer is "no," our argument will be, in my judgment, equally strong, if not stronger, than it would be if we had the direct communication.

Now, I will put it on the hypothesis that the witness will answer "yes." Are we not entitled to know what the Secretary of War said when such a thing as this was published? I need not argue that question. Suppose now that he will answer "no;" are we not entitled to a knowledge of the fact as we propose to prove it here that, although these charges were publicly made in regard to the management of affairs at Fort Sill, the names having been given, the parties being specified, and one of the parties specified being, as we shall show, at that time an intimate personal friend of the Secretary of War, at no stage of the proceedings was any inquiry made by the Secretary of War from any person who would have any right to speak in regard to the source of the information of the facts stated in that communication? We draw our argument from that, and I have no objection to stating it. Our argument is this, that his conduct in that matter is the conduct of a guilty man; it is the conduct of a man who knows that the facts exist; of a man who knows all about the statements in the New York Tribune article, and he does not care to go to anybody to find out the authority.

Mr. Carpenter said:

The rule, of course, must be the same here as it would be in the trial of any criminal case in a court of law, and is this Senate to establish the rule that, as often as a newspaper contains a libel upon an individual that individual must go and shoot the editor, or must sue him for libel, or demand his authority for the article, or stand convicted of the charge? That is the question. They propose to convict this man of everything said in that article because he did not go and make a row about it, because he did not go and demand the authority upon which it was published, bring a libel suit, or shoot the editor. The man who is perfectly conscious of integrity in the matter never runs after such articles—at least there is no law that compels him to do so, and there is no law of presumption against him if he refuses to do it. I should be surprised to see any judicial court establish such a rule, and I sould be anxious and curious to see how many of the Senators now sitting in the view of the Chair would be on their way for about five hundred editors within the next twenty-four hours. If it is a good rule against the Secretary of War, it is a good rule against any public man or any private citizen, and as often as any one of you Senators see a libel upon you in regard to any subject you must "jump for" the editor or you confess your guilt.

The President pro tempore having submitted the question, "Shall the managers be permitted to propound said interrogatory to the witness?" it was decided in the negative without division.

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Then this question was asked:

Q. (By Mr. Manager McMahon.) Did you receive any communication from General McDowell in regard to this article in the New York Tribune?

Mr. Carpenter objected to the question.

Mr. Manager McMahon said:

Mr. President, I simply propose to show that at the time this thing occurred a communication was addressed, and to call for that and have it handed to me. Then I propose to have General McDowell recalled and to refresh his recollection by the contents of that letter. I do not propose to offer it now. * * * Am I not entitled to prove a certain letter which I desire to use in the progress of his case, and to identify it as the letter which the witness has received from a certain person in due course of mail?

The question being submitted to the Senate, they decided without division that the interrogatory might be propounded.

Later, during the same day,[125] Gen. William B. Hazen was called as a witness on behalf of the United States, and Mr. Manager McMahon asked:

State, if you know, who furnished the information upon which the New York Tribune article was published.

This question was later modified to this form:

After the publication of this article in the New York Tribune, state whether the Secretary of War, officially or otherwise, made any inquiry to you in regard to the truth of the statements contained in that article.

Mr. Carpenter objected.

Mr. McMahon explained:

From our standpoint, assuming the testimony which we have already given to be correct, which we have a right to do, we have heretofore proven that the article in the New York Tribune was brought to the knowledge of General Belknap. We have to-day proven that General Belknap had ascertained that the authority for those charges was General Hazen, who had Fort Sill within his lines and who had troops stationed there. We have had from another source that General Belknap was exceedingly indignant * * * because General Hazen had represented it to a committee instead of to him. Now, that is the inference we want to draw from it: There is no libel in the New York Tribune article upon Secretary Belknap; on the contrary, if you will read that article you will find that it expressly excludes the Secretary from participating in this matter, and says that he knows nothing about it. It is no libel upon him in a newspaper, which is a subject upon which my friend is so sensitive, and upon which the counsel made the point, and very properly, that a man should not every time run and see the author of a newspaper article; but here are charges put in this article, coming from an officer whose name is not given, but then at the bottom of it is stated that these charges are made on the authority of a high officer under the Government in the Army. Here is the Secretary of War not charged, not implicated, no libel put upon his character, no stain upon him, but a grievance, a monstrous grievance, is called to his attention, one that demanded the immediate arm of the Government to remedy if it were true. While I submit to the decision that was made a while ago in regard to the testimony of Mr. Whitelaw Reid, and did not propose to argue it at that time, I say that it is the very highest kind of testimony upon a question like this, that when these charges are made in a public newspaper, not against this gentleman who is upon trial, but against certain other individuals, and public attention is called to them, an extract from a letter quoted with quotation marks to indicate that it is an extract from an officer at that point, and then that is fathered by a leading officer in the Army—I say we have a right to show as we propose now to show, that instead of hunting up whether these things are true or not, instead of endeavoring as an officer of the Army to correct these evils, he cloaks them, does not inquire even when he knows the

[125] Senate Journal, pp. 969, 970; Record of trial, pp. 228, 229.

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officer who is the authority for this statement, or the officer commanding this particular post. He shuts his eye to the transaction and goes nowhere for information. He goes neither to Mr. Smalley, who wrote the article, nor to Mr. Reid, who published it, nor to General Hazen, who was the authority for it, and as we shall show hereafter, he neither goes to Evans nor to Caleb P. Marsh to learn anything about it.

Are there no inferences to be drawn from these facts? Is it not the best kind of testimony when we have got the peculiar case that we have here? Then what are your relations, Mr. Secretary, or what were your relations to this man? Was Mr. Marsh privately milking him and dividing with you and you knew it? The inference is almost irresistable that he was aware of all these facts. He knew that General Hazen was the man who was responsible for this statement, and yet he neither corrects the abuses nor calls upon General Hazen in any shape or form.

Mr. Carpenter argued:

The testimony has already shown that Belknap was indignant at Hazen because he had violated the regulations of the Army and had not communicated what he pretended to know as a fact through the military channels, as it was his duty to do, but poured it out into the bosom of a congressional committee. The testimony also shows that Belknap did go to work investigating this matter through the proper channels. He wrote a letter to Grierson, who was in command of the post, and to Evans, and to others there, in regard to the matter. The letter of Mr. Grierson making his report is on the 18th of February. It was received about ten days after that, and the order correcting the whole thing was made on the 25th of March.

Is it possible that Mr. Belknap is to be condemned here because he did not select that particular method of investigation which the managers wish he had selected? He went to work regularly and efficiently. He did not wish to imitate the irregular conduct of General Hazen. Because Hazen had violated his duty and the regulations of the Army, it was not necessary that Belknap should also violate his duty, nor was it necessary that he should chase the newspaper or chase any correspondent of a newspaper; but he set immediately to work investigating through the regular military channels, where officers made their reports upon their character as officers and where if they were untrue they could be court-martialed for their untruth; not anonymous correspondence in newspapers, but regular official investigation, and on the 25th of March the whole matter was cured by the order of that date.

That is the state of facts. The question put to the witness is, Did General Belknap go to you about this matter? They might as well call any other man in Washington and ask, "Did he go to you about it." Belknap was under no obligation to go to General Hazen. He went through the regular channel to the commander of the post. General Hazen was not the commander of that post, and if General Hazen had known anything of irregularities there while he was in command of the post the regulations of war made it his duty to communicate it through the military authorities, not through political and congressional channels, but to make it directly through the official military channels. Then it could be corrected according to the discipline of the Army.

The question being put, "Shall the managers be permitted to propound the said interrogatory?" there appeared ayes 19, noes 18. So the interrogatory was propounded.

2280. In the Peck trial a witness was not permitted to testify to general public opinion on a subject not closely related to respondent's act.

Instance wherein, during an impeachment trial, the respondent personally examined a witness.

On January 11, 1831,[126] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Robert Walsh, was under examination, when this question was asked by the respondent himself:

Do you or not know that at and before the time of the publication there was a general belief in the State of Missouri that many claims to lands in that State, under Spanish grants, were fraudulent?

[126] Second session Twenty-first Congress, Senate Impeachment Journal, p. 333; Report of trial of James H. Peck, pp. 269–273.

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The publication referred to was an opinion by Judge Peck in a case relating to Spanish grants, the case of Soulard's heirs, published in a newspaper in St. Louis. The impeachment arose from the fact that Judge Peck had punished for contempt one Lawless, who had published a criticism of the opinion.

Mr. James Buchanan, of Pennsylvania, chairman of the managers for the House of Representatives, objected to the question. It was argued in behalf of the objection that in the trial of a district judge for the imprisonment of a citizen without law and unjustly, the high court of impeachment might not be led off to the trial of fraudulent land claims in Missouri, and to the trial of them by common rumor. There would be no end to such an inquiry.

In opposition to the objection it was argued by Mr. Jonathan Meredith, counsel for the respondent, and by the respondent himself, that they were prepared to prove fraud in particular cases, and especially fraud by Soulard. It was proper to show what facts the court had in mind when the proceedings against Lawless was had. If the judge believed that the publication by Lawless contained a misrepresentation of the opinion as to the grants, and tended to show them of a fair character, might he not have rightly considered it his duty to repress such an attempt.

Arguing for the managers Mr. Henry R. Storrs, of New York, asked if rumor was evidence in any cause. Suppose, moreover, that it could be proved that there were ten thousand fraudulent land claims in Missouri. What bearing had that on the question of the impeachment. The question was whether Mr. Lawless fairly represented the opinion delivered by the judge, or whether the judge might commit him for a contempt in publishing such an article. Admit even that the claim of Soulard was fraudulent, that claim was not in issue now and the high court was not trying its merits.

The question being put: "Shall this interrogatory be put to the witness?" there appeared yeas 14, nays 27.

2281. In the Peck trial the person alleged to have been oppressed by respondent was required to testify as to acts of his own implying malice against the respondent after the said alleged oppression.—On January 11, 1831,[127] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness on behalf of the managers, Luke E. Lawless, was under cross-examination by counsel for the respondent. The respondent was on trial for unlawfully oppressing Lawless by imprisoning him for contempt for criticising in the public prints a decision by respondent as judge in a case relating to a claim of Soulard's heirs.

Lawless had been imprisoned for an article signed "A Citizen" and published in a St. Louis paper in 1826. Mr. Jonathan Meredith, counsel for the respondent, now produced several newspaper articles published after the publication of 1826, and some published as late as 1830, and proposed this question:

Are you the author of all or either of the articles contained in the newspapers now handed to you relating to the respondent?

[127] Second session Twenty-first Congress, Senate Impeachment Journal, p. 334; Report of trial of James H. Peck, pp. 275–277.

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Mr. James Buchanan, of Pennsylvania, chairman of the managers on behalf of the House of Representatives, objected to the question, on the ground that a witness on cross-examination might not be compelled, if the publications were reprehensible, to accuse himself. It was also urged by Mr. George McDuffie, of South Carolina, one of the managers, that the letters were wholly external to the case, for it could not be supposed that Judge Peck, in imprisoning Lawless, could have had foresight of these publications. They had nothing to do with the question as to whether or not Judge Peck was guilty of illegally imprisoning a citizen.

Mr. Meredith contended that in a case of libel or slander subsequent words or libels might be given in evidence to show quo animo the words were spoken or the libel written. He referred in support of this to Second Saunders on Pleading and Evidence, page 382.

On behalf of the managers it was urged that the authority cited might be applicable if Mr. Lawless were on trial for a libel, but could any authority be produced to prove that a witness under examination might be called on to establish his own guilt, if there be any, by his own testimony? Was not this directly in face of the constitutional provision that no person should be compelled to be a witness against himself? Should a judge be permitted to drive a man by oppression into the public newspapers for redress and then be allowed to use those very publications for the purpose of proving the existence of malice in the author previous to the date of his punishment.

Mr. Meredith said:

I am perfectly aware that we are not now trying Mr. Lawless for a libel. The argument and the authority were merely analogical—they both apply to this case. The principle is the same as in a case of libel. One of the great questions in this cause is the question of misrepresentation. After we have shown the misrepresentation it may be necessary, perhaps, to go a step further and show that it was intentional. We take that step when we show subsequent attacks upon the respondent, of which Mr. Lawless was the author. Is not this the object of such evidence in the case of a libel? and why should it not be as competent in a case of this kind, where intention is the question? It matters not at what subsequent period these publications were made. * * * They relate back to the original publication, and show the design and intention of the author. Again, does the lapse of time at all affect the second view with which this testimony is offered? Mr. Lawless is a witness in this cause. He has testified before this court, and one inquiry, and a main inquiry, is with what temper is he here as a witness? And do not these publications, if he be the author of them, go to evince that temper and feeling?

On the question, "Shall this interrogatory be put to the witness?" there appeared, yeas 28, nays 13.

2282. The witness having testified that a report of a speech was made partially by others as well as by himself, the report was not admitted in evidence.

Instance of a ruling by the Chief Justice on a question of evidence during the Johnson trial.

On April 3, 1868,[128] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler offered in evidence a report of a speech of the President printed in a newspaper.

Mr. William M. Evarts, of counsel for the President, objected to the admission of the report as evidence on the ground that the reporter

[128] Second session Fortieth Congress, Senate Journal, p. 880; Globe supplement, pp. 106, 107.

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Hudson, who had been examined, had testified that a portion of the speech had been printed from notes taken by another reporter.

After discussion the Chief Justice [129] said:

The managers offer a report made in the Leader newspaper of Cleveland as evidence in the cause. It appears from the statement of the witness Hudson that the report was not made by him wholly from his own notes, but from his own notes and the notes of another person whose notes are not produced, nor is that person himself produced for examination. Under these circumstances the Chief Justice thinks that that paper is inadmissible. Does any Senator desire a vote of the Senate on the question?

Mr. Charles D. Drake, of Missouri, having asked for a vote of the Senate, the question was taken on admitting the paper as evidence, and there appeared, yeas 35, nays 11. So the report was admitted.

2283. Judge Swayne being charged with wrongfully committing persons for contempt, testimony as to the condition of the jail was ruled out as immaterial.—On February 16, 1905,[130] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Charles M. Coston, a witness on behalf of the managers, was questioned by Mr. Manager David A. De Armond, of Missouri, as to the acts of the respondent in committing certain persons for contempt, and this question was asked:

Q. Well, where were they in the county jail?—A. They were in a room next to what they call "the prisoner department of the jail." This jail is a brick building, two stories in height. There is an entrance——

Mr. John M. Thurston, of counsel for the respondent, here intervened, objecting:

Mr. President, is Judge Swayne, this respondent, to be answerable for the manner in which the imprisonment was conducted in the absence of any testimony tending to show that he gave any directions with respect to it? If not, we object to this feature of the testimony.

Mr. Manager De Armond said:

Mr. President, the object of the inquiry was to ascertain where they were confined and how they were confined—something about the jail and the accommodations, or the lack of accommodations, that they had in the jail, in a general way, and the punishment that they endured under this sentence of the court. * * * We think it is material to the issue to show what the punishment inflicted upon them was, and to leave the court, in passing upon the matter with all the testimony upon the subject before the court, to determine how far the judge knew that such accommodations or lack of accommodations would be their lot in sentencing them—whether it was a proper sentence as to the amount of punishment or whether it was excessive. We are getting at the animus of the judge. * * * I think upon the question whether the sentences were excessive or not—as to that branch of it—it would be competent for the respondent to show, if he could show, that the imprisonment was not for an unusually long time; that the punishment was not excessive, if, as a matter of fact, the persons sentenced to the jail were taken to quarters which were commodious and clean and if there were no especially contaminating influences from the low class of criminals confined in the same jail at the same time; if they were the only occupants, for instance, and were in the rooms or apartments of the sheriff or keeper of the jail, instead of being in with the common criminals—I believe that would be competent for the respondent to offer in the case. It seems to me it is competent for those prosecuting the case to show the kind of confinement, the kind of place to which he sentenced them, bearing upon the question whether he had the right to send them there at all, and whether the punishment was excessive in sending them there for that length of time. That is all I wish to say about that.

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[129] Salmon P. Chase, of Ohio, Chief Justice.
[130] Third session Fifty-eighth Congress, Record, pp. 2718, 2719.

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For information, I ask the President whether I am to understand the ruling to be that all questions in regard to the jail are to be excluded? I do not wish to ask questions simply for the sake of asking them, of course.

The Presiding Officer [131] said:

The Presiding Officer does not see that the question as to the character of the jail or the way in which the persons sentenced for contempt were confined there is proper. It can not be said that Judge Swayne is responsible for that without some evidence is adduced showing that the judge directed something to be done which was improper. * * * The Presiding Officer thinks that it is not material to this issue to prove the condition of the jail. It any Senator so desires, the Presiding Officer will submit the question to the Senate.

On February 20,[132] during examination of a witness, Simeon Belden, by Mr. Manager De Armond, the following occurred:

Q. What was done with you?—A. I was locked up in the jail.

Q. What part of the jail—in a cell or not?

Mr. THURSTON. Wait a moment. We interpose the same objection that we made the other day. Nothing that possibly happened in and about that jail or the manner or method of the confinement of the witness could be chargeable to Judge Swayne.

Mr. Manager DE ARMOND. Mr. President, when the matter was up before, what we were trying to show was the general condition of the jail and the general way in which the prisoners were handled or cared for there. Now, I am asking simply a narrative. There was a sentence pronounced against this gentleman and Mr. Davis, and I am asking what was done in the carrying out of that sentence. I suppose, if the sentence had not been carried out at all, it would be competent for the respondent to show it, and I think it is certainly competent for us to show whether it was carried out and how it was carried out. I do not mean in the way of going into the details or description about the jail, but what was done with these men.

The PRESIDING OFFICER. Anything more than that they were imprisoned for a certain length of time?

Mr. Manager DE ARMOND. Well, I desire to show where they were put, where they were changed to—without going into the matter of details—and how long they were kept there.

The PRESIDING OFFICER (to the witness). Answer the question.

A little later,[133] while Mr. Manager De Armond was examining a witness, Michael Murphy, the following occurred:

Q. State whether or not you were in charge of the jail when General Belden and Mr. Davis were brought there by the United States marshal or deputy marshal.—A. Yes, sir; I was in charge of the jail.

Q. Was there a commitment brought with them?—A. To the best of my knowledge; yes, sir.

Q. State what you did with them.—A. I——

Mr. THURSTON. One moment. We object to this. We did not insist very hard on our right to this objection while Mr. Belden was testifying, but it is certain that what took place in that jail, its condition, the way the prisoners slept, the way they were fed, the way they were treated, could not be used to prejudice the court against Judge Swayne unless they first laid the foundation for it by showing that he was responsible for it or directed it.

The PRESIDING OFFICER. That was the opinion of the Presiding Officer on a former day, but the questions which were asked Mr. Belden were allowed on the ground that they were a narrative of what occurred. The Presiding Officer does not think that evidence showing that the condition of the jail was an improper one is admissible unless it be shown that it was known to Judge Swayne and that that was part of his motive in committing them there.

Mr. Manager DE ARMOND. I was not going to ask the witness about the general condition of the jail. I was going to ask questions practically the same as those asked General Belden; about what was done with them.

The PRESIDING OFFICER. What is the purpose of the questions?

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[131] Orville H. Platt of Connecticut, Presiding Officer.
[132] Record, pp. 2906, 2907.
[133] Record, p. 2908.

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Mr. Manager DE ARMOND. To show the punishment they endured.

The PRESIDING OFFICER. Unless there is something unusual in the character of the jail which was known to Judge Swayne, the Presiding Officer thinks the evidence is inadmissible.

2284. Decisions as to relevancy of testimony during the Peck trial.—On December 23, 1830,[134] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, a witness, Luke Edward Lawless, was under cross-examination by Mr. William Wirt, counsel for the respondent. The witness, in a communication signed "A Citizen," and published in a St. Louis paper, had criticised an opinion delivered by Judge Peck in the case of Soulard's heirs. The judge was now on trial for punishing Lawless for contempt.

Mr. Wirt asked a question, reduced to writing, as follows: The witness is asked to refer to such parts of the opinion of the respondent in Soulard's case as support the first specification in the article signed "A Citizen."

Mr. James Buchanan, of Pennsylvania, of the managers on the part of the House of Representatives, objected that the question was irrelevant. The court had before them, he said, the publication of the witness, in which he had placed his assumptions in one column, and the passages in the opinion from which they were deduced in another column.

Mr. Wirt responded that the managers in opening the case had argued that there had been no misrepresentation of the opinion in the letter; and the question which he had asked was useful in determining the truth or lack of truth in the claim of the managers.

The question having been read to the court, the Vice-President put the question: "Shall this interrogatory be put to the witness?" and it was determined in the affirmative, yeas 32, nays 10.

2285. On December 22, 1830,[135] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, while a witness, Luke Edward Lawless, was under cross-examination, Mr. Jonathan Meredith, counsel for the respondent, put the following interrogatory:

What was your contract for professional compensation in the case of Soulard's heirs?

It was for criticism of Judge Peck's decision in the case of Soulard's heirs that the witness had been punished by Judge Peck, and it was because of this punishment that the impeachment proceedings had been instigated.

The question being objected to by the witness and also by the managers for the House of Representatives, the question was put: "Shall this interrogatory be put to the witness?" and decided in the negative, yeas 19, nays 23.

2286. On January 10, 1831,[136] in the high court of impeachment during the trial of the cause of The United States *v.* James H. Peck, a witness, Josiah Spalding, was asked the following question by Mr. Jonathan Meredith, counsel for the respondent:

What are the terms in which Mr. Lawless, according to general reputation, is in the habit of speaking of courts, both in their presence and out of court?

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[134] Second session Twenty-first Congress, Senate Journal, p. 329; Report of the Trial of James H. Peck, pp. 122–125.

[135] Senate Impeachment Journal, p. 328, second session Twenty-first Congress.

[136] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, pp. 261–263.

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Judge Peck was on trial for the punishment of Mr. Lawless for contempt of court in criticising in a newspaper an opinion by the judge.

Mr. James Buchanan, of Pennsylvania, chairman of the managers, objected to the portion of the question contained in the words "and out of court."

Mr. Meredith admitted that he should not have asked the question had he not thought he had the assent of the managers.

The court, by a vote of yeas 3, nays 39, sustained the objection.

2287. General decisions during the Johnson and Belknap trials as to relevancy of testimony.

Instances of decisions by the Chief Justice on questions of evidence during the Johnson trial.

On April 15, 1868,[137] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Benjamin R. Curtis, of counsel for the respondent, offered in evidence a letter of McClintock Young, Acting Secretary of the Treasury, removing Richard Coe from the officer of appraiser at Philadelphia.

Mr. Manager Benjamin F. Butler objected to the proposed evidence as irrelevant. The letter, it was true, showed the direction of the President that the act be done; but if it were admitted it would be necessary to investigate whether or not the Acting Secretary or even the President might make the removal without consent of the Senate.

Mr. Curtis argued as to the act of Mr. Young:

He says that he proceeds by the order of the President, and I take it to be well settled judicially and practically that wherever the head of a Department says he acts by the order of the President he is presumed to tell the truth, and it requires no evidence to show that he acts by the order of the President. No such evidence is ever preserved, no record is ever made of the direction which the President gives to one of the heads of Departments, as I understand, to proceed in a transaction of this kind. But when a head of a Department says "by order of the President I say so and so" all courts and all bodies presume that he tells the truth.

The Chief Justice [138] ruled:

The Chief Justice thinks that this evidence is admissible. The act of a Secretary of the Treasury is the act of the President unless the contrary be shown. He will put the question to the Senate, however, if any Senator desires it. [After a pause.] The evidence is admitted.

2288. On April 20, 1868,[139] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of the examination of Alexander W. Randall, Postmaster-General, proposed certain questions which were objected to. As a result of this the Chief Justice said:

The honorable manager appears to the Chief Justice to be making a statement of matters which are not in proof, and of which the Senate has as yet heard nothing. He states that he intends to put them in proof. The Chief Justice therefore requires that the nature of the evidence that he proposes to put before the Senate shall be reduced to writing as has been done heretofore. He will make the ordinary offer to prove, and then the Senate will judge whether they will receive the evidence or not.

Thereupon Mr. Manager Butler submitted this offer:

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[137] Second session Fortieth Congress, Senate Journal, p. 899; Global supplement, p. 183.
[138] Salmon P. Chase, of Ohio, Chief Justice.
[139] Second session Fortieth Congress, Senate Journal, p. 915; Globe supplement, pp. 240–242.

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We offer to show that Foster Blodgett, the mayor of Augusta, Ga., appointed by General Pope, and a member of the constitutional convention of Georgia, being, because of his loyalty, obnoxious to some portion of the citizens lately in rebellion against the United States, by the testimony of such citizens an indictment was procured to be found against him; that said indictment being sent to the Postmaster-General, he thereupon, without authority of law, suspended said Foster Blodgett from office indefinitely, without any other complaint against him and without any hearing and did not send to the Senate the report of such suspension, the office being one within the appointment of the President by and with the advice and consent of the Senate; this to be proved in part by the answer of Blodgett to the Postmaster-General's notice of such suspension, being a portion of the papers on file in the Post-Office Department upon which the action of the Postmaster-General was taken, a portion of which have been put in evidence by the counsel of the President, and that Mr. Blodgett is shown by the evidence in the record to have always been friendly to the United States and loyal to the Government.

Mr. William M. Evarts, of counsel for the respondent, objected to this evidence as wholly irrelevant to this case. The evidence concerning Foster Blodgett was produced on the part of the managers, and on their part was confined to his oral testimony that he had received certain commissions under which he held the office of postmaster at Augusta; that he had been suspended in that office by the Executive of the United States in some form of its action, and there was a superadded negative conclusion of his that his case had not been sent to the Senate. In taking up that case the defense offered nothing but the official action of the Post-Office Department, coupled with the evidence of the head of that Department that it was his own act, without previous knowledge or subsequent direction of the President of the United States. In that official order, thus a part of the action of the Department, it appears that the ground of it was an indictment against Mr. Blodgett. A complaint was made that that indictment was not produced. The managers having procured it, having put it in evidence, they now propose to put in evidence his answer to that indictment or to the accusation made before the Postmaster-General.

After argument Mr. Manager Butler modified the question so as to stand as follows:

The defendant's counsel having produced from the files of the Post Office Department a part of the record showing the alleged cause for the suspension of Foster Blodgett as deputy postmaster at Augusta, Ga., we now propose to give in evidence the residue of said record, including the papers on file in the said case, for the purpose of showing the whole of the case as the same was presented to the Postmaster-General before and at the time of the suspension of the said Blodgett.

Mr. Evarts said:

Our objection to that offer, as we have already stated, is that it does not present correctly the relation of the papers.

The Chief Justice said:

The defendant's counsel having produced from the files of the Post Office to prove has been withdrawn. The offer which has just been read has been substituted. Senators, you who are of opinion that the evidence now proposed to be offered should be received will say aye; contrary opinion, no. [Putting the question.] The noes have it. The evidence is not received.

2289. On July 11, 1876.[140] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Gen. William

[140] First session Forty-fourth Congress, Senate Journal, pp. 973, 974; Record of trial, p. 245.

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B. Hazen, a witness on behalf of the United States, was recalled, and in the course of cross-examination, Mr. Matt. H. Carpenter, of counsel for respondent, asked:

Is it according to discipline in the Army for an officer to publish scandal of the President which he knows nothing about except from hearsay?

Mr. Manager John A. McMahon said:

I must at this point enter an objection. It seems that my friend here is pursuing the old line, having the old misapprenhension that every now and then crops out in this case. The misapprehension is that he is trying General Hazen and not General Belknap.

Mr. Carpenter argued:

Mr. President, this witness has been laboring for months to get up this impeachment for his own vindication. He came back here to-day for explanation, and I am doing everything in my power to assist his purpose. I want to show what his motives have been; I want to show that they are utterly groundless; I want to show that he has violated all the proprieties and all the duties of his official station by the hand he has taken in this matter and his anxiety to fan public sentiment against General Belknap, who has never done him an injury in his lifetime, and who had shown him so many favors that General Sherman objected to his giving him another; and that is the man who repeats gossip against the President and against the then Secretary of War, and publishes it in letters over his own name.

The Senate, without division, decided the question inadmissible.

2290. On January 12, 1876,[141] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Hon. Hiester Clymer, chairman of the committee of the House of Representatives which had taken the testimony on which the impeachment was based, was examined as a witness for the United States, and then was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. Mr. Carpenter asked:

How long has the committee been engaged in investigating the affairs of the War Department?

Mr. Manager John A. McMahon objected, saying:

I only want to understand how far this is to go. If any inference is to be drawn from any investigation held there that there is nothing else in this matter but what has been charged, we shall claim to put in the testimony which has been taken, which we shall certainly claim thows a good deal of light on other transactions and on this. We have carefully excluded them up to this point.

The question being put to the Senate, the interrogatory was admitted without division.

Very soon thereafter, the witness was reexamined by the managers, and Mr. Manager McMahon asked:

Had your committee taken any other testimony except Mr. Marsh's at the time that the House ordered the impeachment of Mr. Belknap and notified the Senate to that effect?

Mr. Carpenter having challenged the question, Mr. McMahon stated that it was put to rebut the presumption raised by the former question. If that was pertinent, this was.

After discussion the question was put: "Shall this interrogatory be admitted," and there appeared, ayes 11, noes 16, no quorum.

Thereupon, to save time, Mr. McMahon withdrew the question.

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[141] First session Forty-fourth Congress, Senate Journal, p. 975; Record of trial, pp. 254, 255.

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2291. On July 11, 1876,[142] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, was under examination, when the following questions were asked, and the following colloquy took place between Mr. Matt. H. Carpenter, of counsel for the respondent, and Messrs. Managers John A. McMahon and Elbridge G. Lapham:

Q. (By Mr. Manager McMahon). Your wife has been subpoenaed as a witness to attend this tribunal?—A. Yes, sir.

Q. I desire you to state now whether she is able to attend.

Mr. CARPENTER. What is the object of that?

Mr. Manager MCMAHON. We want to know from the witness whether she is able to attend.

Mr. CARPENTER. We object. What has that to do with this case whether she is well or sick?

Mr. Manager MCMAHON. We have a right to send for her if she is able to come. Let the objection be passed upon by the Senate.

The PRESIDENT pro tempore. The counsel object to the question propounded by the managers. Shall the question be admitted?

The question was determined in the affirmative.

Q. (By Mr. Manager McMahon.) State whether your wife is able to be present in the court to be examined as a witness.—A. She is not, she is very ill.

Q. Have you the certificate of a surgeon to that effect?—A. I have.

Q. Whose certificate is it?—A. Dr. Alfred L. Loomis.

Mr. CARPENTER. Will the managers state now what the object of that testimony is?

Mr. Manager LAPHAM. It is to inform the Senate the reason why we do not call Mr. Marsh.

Mr. CARPENTER. Is it proposed to raise any presumption against the defendant?

Mr. Manager LAPHAM. We shall argue that hereafter.

Mr. CARPENTER. We will take her testimony that was given before the committee if the managers want that, or consent to have her deposition taken. We want to completely repel the presumption that Mrs. Marsh being ill is any evidence of our guilt.

Mr. Manager MCMAHON. The managers here decline to do that. I do not agree with them in that matter. The counsel will make his application to the Senate personally.

2292. **Testimony admitted in the Swayne trial as material, although objected to as not bearing directly on the issues.**—On February 21, 1905,[143] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness called on behalf of the respondent, was examined by Mr. John M. Thurston, of counsel for the respondent, and was questioned as to a suit known as the Florida McGuire case, the following being one of the questions:

During the first week of the court what steps did you take, if anything, to inform yourself as to the probability of the case being tried and as to when it might be reached upon the docket?

Mr. Manager David A. De Armond, of Missouri, objected:

We think it is an immaterial matter what steps he took to ascertain when the case would be for trial and what he did about it. He is not a party to the record nor a party to the proceeding that we are trying.

Mr. Thurston said:

Mr. President, we propose to show that the defendants in that case prepared themselves for trial, got out their list of witnesses, were ready for trial when the case was reached, and that they had a right to demand from the judge that he should not grant any postponement of that trial unless upon legal cause shown.

Mr. Manager DE ARMOND. I suggest in regard to that matter that the persons upon the other side are the persons whose conduct should be inquired about.

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[142] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, p. 243.
[143] Third session Fifty-eighth Congress, Record, p. 2980.

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What the defendants in that Florida McGuire case did or what they thought certainly are not matters for which the attorneys upon the other side could be held responsible. It is not inquiring anything about the attorneys of Florida McGuire—the parties who are proceeded against for contempt—but it is inquiring about what the attorneys upon the other side did, and what the attorneys upon the other side thought, and why the attorneys upon the other side did or thought certain things.

The Presiding Officer said: [144]

Does the Presiding Officer understand that that was stated in the trial of that case?

Mr. THURSTON. Yes, Mr. President. I also propose to show it for another purpose. It is part of the res getae of this proceeding that has been gone into in detail and in such a manner that we might have objected at every step, but which, in deference to the desire of this court to proceed as rapidly as possible, we did not take advantage of.

The PRESIDING OFFICER. The Presiding Officer thinks the question may be asked.

2293. On February 21, 1905,[145] in the Senate sitting for the impeachment trial of Judge Charles Swayne, William A. Blount, a witness on behalf of the respondent, was examined as to a suit known as the Florida McGuire case by Mr. John M. Thurston, of counsel for the respondent:

Q. On that trial were there any witnesses called by Florida McGuire or her counsel or examined on her side who did not live in Pensacola, either upon or in the immediate vicinity to the Rivas tract?—A. So far as I know, not. I have to answer that this way: That a good many of these witnesses are known to me only in a general way, and I know generally where they reside. I do not know them personally, but I think that they all reside within a mile of the court-house in Pensacola.

Q. How long, in your judgment, would it have taken the United States marshal to have subpoenaed them all as witnesses?—A. If they had all been at home at the time they could have been subpoenaed in an hour or a half or two hours.

Mr. THURSTON. We offer this original praecipe for witnesses in that case. It is the original document which was identified the other day, and we ask, for the purpose of making up the record, that the certified copy may go in instead.

Mr. Manager David A. Armond, of Missouri, said:

We ask what is the object of offering this paper? What is it for? What do counsel expect to prove by it?

Mr. THURSTON. The object is to disprove the testimony of Judge Belden, who was very clearly brought to state that the only reason they decided to discontinue the Florida McGuire case was that they needed forty or fifty witnesses, many of them living at a distance, and that they could not possibly secure them from the time of Saturday afternoon, when court adjourned, to Monday morning, when the case was to be called. * * * I have now shown that upon the reincarnation of the Florida McGuire case between the same parties was tried out in full in the same court, and that on that trial they only asked on behalf of Florida McGuire for twelve witnesses by subpoena, and that they all lived, and that all the witnesses they produced lived, right there. It is in line with our insistence that here was a conspiracy against the dignity and the honor of the court by its officers; and that it is a mere subterfuge in their testimony to claim that they discontinued that case because they had a multitude of witnesses who could not be obtained, when the fact was, as we propose to show and insist, that their discontinuance of that case resulted solely and alone because they were held and taken to task for their conspiracy and for their contempt.

Mr. Manager DE ARMOND. Mr. President, the statement of the witness, Belden, was that they had forty or fifty witnesses for the trial, which was expected to take place in November, and that it would be impossible to get them for Monday, with notification upon the Saturday preceding.

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[144] Orville H. Platt, of Connecticut, Presiding Officer.
[145] Third session Fifty-eighth Congress, Record, p. 2982.

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This, now, is a paper which purports to be a list of some of the witnesses called for and used upon a trial which took place some time the next year in the suit brought over again—in another suit. It does not at all follow from the fact that this paper contains a list of twelve names that they did not have forty or fifty witnesses for the trial before, nor does it follow that the names of all the witnesses are contained upon the paper, or that they did not need or did not use any other witnesses upon the second trial. So it is an immaterial sort of paper, we think.

The Presiding Officer [146] said:

The Presiding Officer thinks the paper bears on the question, although it is not conclusive.

[146] Orville H. Platt, of Connecticut, Presiding Officer.

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Impeachment and Trial of William Blount *

1. Preliminary examination. Section 2294.
2. Delivery of impeachment at the bar of the Senate. Sections 2295, 2296.
3. Framing of the articles. Sections 2297–2299.
4. Choice of managers. Sections 2300.
5. Presentation of articles in Senate. Sections 2301, 2302.
6. Organization of Senate for trial. Section 2303.
7. Writ of summons and return. Sections 2304–2308.
8. Answer of respondent. Sections 2309–2310.
9. Replication of House. Section 2311.
10. Arguments as to impeachable offenses. Section 2312–2315.
11. Is a Senator a civil officer. Section 2316.
12. Effect of resignation of respondent. Section 2317.
13. Senate without jurisdiction to try. Senate 2318.

2294. The impeachment of William Blount, a United States Senator, in 1797.

The proceedings of the Blount impeachment were set in motion by a confidential message from the President of the United States.

In the Blount case the House voted to impeach on the strength of the matter contained in a letter proved to be in respondent's handwriting.

In the Blount impeachment case it was ruled that evidence should be taken before the House, and not before the Committee of the Whole.

In the Blount impeachment case the House seems to have distrusted its power to authorize the Speaker to administer oaths.

The House excused one of its Members from voting on any question connected with the impeachment to the bar of the Senate.

Forms of the resolutions impeaching William Blount and directing the carrying of the mpeachment to the bar of the Senate.

The Blount impeachment was carried to the bar of the Senate by a single Member of the House.

On July 3, 1797,[1] a confidential message was received in the House from the President of the United States, who transmitted a letter purporting to have been written by William Blount, a Senator of the United States for the State of Tennessee, to one James Carey, interpreter for the United States to the Cherokee Nation of Indians, for the purpose of seducing him from his duty and trust, in furtherance of certain unlawful designs. The message and papers were referred to a committee composed of Messrs. Samuel Sitgreaves, of Pennsylvania; Abraham Baldwin, of Georgia; Samuel W. Dana, of Connecticut; John Dawson, of Virginia, and William Hindman, of Maryland.

*Hinds' Precedents, Vol. 3, p. 644 (1907).
[1] First session Fifth Congress, Journal (supplemental); p. 76, Annals, p. 439.

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On July 6 [2] Mr. Sitgreaves reported from the committee the following resolution:

Resolved, That William Blount, a Senator of the United States from the State of Tennessee, be impeached of high crimes and misdemeanors.

This report was on the same day considered in a Committee of the Whole House. Mr. Sitgreaves stated that the President had been advised by the law officers of the Government that the letter was evidence of crime; that the crime was of the denomination of a misdemeanor; and that William Blount, being a Senator, was liable to impeachment. In conformity with this opinion, the letter had been transmitted to the House. There was debate as to whether or not a legislator was an officer liable to impeachment, after which Mr. Sitgreaves made a statement [3] as to the forms of procedure:

As to the form of proceeding necessary to be taken on this occasion, he would state what the opinion of the committee was as to this matter. They supposed it would be first proper for that House to determine that the gentleman in question should be impeached. This being done, that a Member of that House should go to the bar of the Senate and impeach the person, in the name of the House and of the people of the United States, and state that the House of Representatives will proceed to draw out specific articles of charge again him. According to the case, they require that he shall be sequestered from his seat, be committed, or be held to bail. When this is done, a committee will be appointed to draw articles of impeachment.

The reason, Mr. S. said, why some steps should be taken at present was that means should be taken to secure the person of the offender, either by confinement or by bail, since it was the opinion of the law officers of Government that he could not be arrested by ordinary process. He could not be arrested by the Senate; they could send for him (as he understood they had done) by the Sergeant-at-Arms, to take his seat in the House; but when the House adjourned, they had no further power over him until an impeachment was made against him.

Gentlemen said there was no danger of escape. If it were not improper to state what had taken place out of doors, it might be said that there had already been an attempt at an escape. Besides, if no investigation were now to take place, how were they to come to a knowledge of the plot which gentlemen seemed so desirous to come to a knowledge of? When they had determined to make the impeachment, and an oral declaration was made of it to the Senate, when they were ready to go home, they might go, and exhibit the charges at the next session, when they should have leisure fully to consider the subject.

Mr. John Rutledge, Jr., of South Carolina, who had attended the trial of Warren Hastings, approved the form of procedure, but suggested that the handwriting of Mr. Blount should be proven, and submitted a motion to that effect.

The chairman [4] suggested that the proof should be taken in the House, and this opinion prevailed, it being urged that the Committee of the Whole did not have the power of taking evidence. The committee accordingly arose.

In the House the Speaker [5] suggested the propriety of calling in a magistrate, as the Speaker had no power to administer an oath except in the case of qualifying the Members of the House. A motion to authorize the Speaker to administer the oath was disagreed to, 29 yeas, 53 nays.[6]

Then it was [7]

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[2] Journal, p. 70; Annals, pp. 448–458.
[3] Annals, p. 455.
[4] George Dent, of Maryland, Chairman.
[5] Jonathan Dayton, of New Jersey, Speaker.
[6] Annals, p. 458.
[7] Journal, p. 71.

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Ordered, That William Barry Grove, Abraham Baldwin, Joseph McDowell, and Nathaniel Macon, Members of this House, be examined upon oath, at the bar of this House, touching their knowledge of the handwriting of William Blount, a Senator of the United States for the State of Tennessee; and that Reynold Keene, esq., one of the judges of the court of common pleas for the county of Philadelphia, and also one of the aldermen of the city of Philadelphia, in the State of Pennsylvania, administer the said oath.

The said Members were then sworn, and, being interrogated by the Speaker, severally answered that they believed the letter to be in the handwriting of William Blount.

It was then

Ordered, That the testimony of the said Members be reduced to writing by the Clerk, and that the same be referred to the Committee of the Whole House, to whom was committed the report of the committee to whom was referred the message of the President of the United States of the 3d instant.

On July 7 [8] the Speaker laid before the House a letter from Thomas Blount, a Member from North Carolina, and brother of William Blount, praying that he might be excused from voting on any question arising in the course of the impeachment proceedings. Thereupon it was

Ordered, That the said Thomas Blount be excused from voting on any question relating to the impeachment, now pending in this House, of William Blount, a Senator of the United States for the State of Tennessee.

On July 7,[9] also, the Committee of the Whole reported and the House agreed to the resolution that William Blount be impeached.

Then Mr. Sitgreaves moved an order which, with modification, was agreed to as follows:

Ordered, That Mr. Sitgreaves do go to the Senate, and, at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, impeach William Blount, a Senator of the United States, of high crimes and misdemeanors; and acquaint the Senate that this House will in due time exhibit particular articles against him, and make good the same.

2295. Blount's impeachment continued.

In the Blount impeachment, following the precedent of the Hastings trial, the House did not send the articles to the Senate with the impeachment.

In the first impeachment the House followed English precedents to the extent of requiring the sequestration of the respondent from his seat in the Senate.

It was suggested by Mr. Albert Gallatin, of Pennsylvania, that the articles of impeachment should be prepared and presented with the impeachment. To this the reply was made: [10]

Mr. Sitgreaves said that the mode which he proposed was the same which was practiced in the case of Mr. Hastings. Mr. Burke went up to the House of Lords and impeached him in words similar to those now proposed to be used. Some time afterwards, the articles of impeachment having been drawn, Mr. Burke again went up to the House of Lords and exhibited them. Mr. S. spoke also of a work lately published, in continuation of Judge Blackstone's Commentaries, which had a chapter on parliamentary impeachment, and pointed out this as the proper mode of procedure. He had also looked into the proceedings on the trial of the Earl of Macclesfield, and found the same course was taken. It was true that in the case of a public officer of the State of Pennsylvania, which perhaps his col-

[8] Journal, p. 72; Annals, p. 458.
[9] Journal, p. 72; Annals, p. 459.
[10] Annals, p. 459.

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league might have in his eye, the articles of impeachment were exhibited at the same time that the impeachment was made.

On motion of Mr. Sitgreaves it was:

Ordered, further, That Mr. Sitgreaves do demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for the appearance of the said William Blount to answer to the said impeachment.

It was objected that it was not necessary to follow so closely the English precedents, since capital punishment could not follow a conviction on impeachemnt in this country. Therefore it would be unnecessary to confine the one impeached. But the House agreed to the order, ayes 41, noes 30.[11]

2296. Blount's impeachment, continued.

Form used in delivering the Blount impeachment at the bar of the Senate.

Upon the impeachment of William Blount the Senate took him into custody and required bonds for his appearance, and informed the House thereof.

Form of report to the House of an impeachment carried to the bar of the Senate.

On July 7,[12] while the Senate was engaged in proceedings for the expulsion of the said William Blount for the offense set forth in the message of the President, Mr. Sitgreaves appeared with the following message from the House:

Mr. President, I am commanded, in the name of the the House of Representatives and of all the people of the United States, to impeach William Blount, a Senator of the United States, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

I am further commanded to demand that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer the said impeachment.

Thereupon the Senate agreed to the following:

Pursuant to a message from the House of Representatives of the United States by Samuel Sitgreaves, esq., a Member of that House, that they, in their own name, and in the name of all the people of the United States, have impeached William Blount, a Member of the Senate, of high crimes and misdemeanors; and that, in due time, they will exhibit articles against him and make good the same; and they having demanded that the said William Blount be sequestered from his seat in this House, and that the Senate take order for his appearance to answer to the said impeachment:

Resolved, That the said William Blount be taken into custody of the messenger of this House until he shall enter into recognizance, himself in the sum of $20,000, with two sufficient sureties in the sum of $15,000 each, to appear and answer such articles of impeachment as may be exhibited against him.

Whereupon Mr. Blount named his sureties, and they were satisfactory to the Senate.

The President then named Mr. Blount and his sureties, who arose while the recognizance was read, and, being approved by the Senate, it was executed in their presence.

On the same day Mr. Sitgreaves returned to the House and reported:[13]

That, in obedience to the order of this House, he had been to the Senate, and in the name of this House and of all the people of the United States, had im-

[11] Annals, p. 462.
[12] Senate Journal, p. 388; Annals, p. 39.
[13] House Journal, p. 73.

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peached William Blount, a Senator of the United States, of high crimes and misdemeanors, and had acquainted the Senate that this House will, in due time, exhibit particular articles against him and make good the same.

And, further, that he had demanded that the said William Blount be sequestered from his seat in the Senate, and that the Senate do take order for his appearance to answer to the said impeachment.

On July 8 [14] it was ordered by the Senate:

Ordered, That the Secretary of the Senate notify the House of Representatives that, in consequence of their message of yesterday, by the Hon. Mr. Sitgreaves, one of their Members, they have caused William Blount to recognize, in the sum of $20,000 principal, with two sureties in the sum of $15,000 each, to appear and answer to the impeachment mentioned in their message.

2297. Blount's impeachment, continued.

In the Blount impeachment the drawing up of the articles was confided to a select committee, with power to procure testimony.

In the Blount impeachment the House, after discussion, empowered the committee drawing the articles to sit during the recess of Congress.

On the same day and succeeding day, in the House, the following resolutions appear to have been agreed to: [15]

Resolved, That a committee be appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, and that the said committee have power to send for persons, papers, and records.

Resolved, That the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, impeached by this House of high crimes and misdemeanors, be authorized to sit during the recess of Congress.

Resolved, That the said committee be instructed to inquire, and by all lawful means to discover, the whole nature and extent of the offense whereof the said William Blount stands impeached, and who are the parties and associates therein.

The privilege of sitting during the recess was the subject of considerable debate, but precedents from English practice and from trials in South Carolina and Pennsylvania were cited.

Messrs. Sitgreaves, Baldwin, Dana, Dawson, and Robert Goodloe Harper, of South Carolina, were appointed to prepare and report articles of impeachment.

2298. Blount's impeachment, continued.

After his expulsion from the Senate William Blount was surrendered by his bondsmen, and gave bonds anew to answer to the impeachment.

On July 8 [16] in the Senate, the trial of William Blount terminated with his expulsion.

On this, Mr. Butler, in behalf of himself and Mr. Thomas Blount, the other surety, surrendered the person of William Blount, the principal, to the Senate, and requested to be discharged from their recognizance. Whereupon, it was

Ordered, That they be discharged from their recognizance, and that the Secretary enter an indorsement on the back of the bond as follows:

"And now, to wit, on this 8th day of July, 1797, the Hon. Thomas Blount and Pierce Butler, esqs., came into the Senate and surrendered William Blount, esq., for whom they became bound yesterday.

[14] Senate Journal, p. 390; Annals, p. 40.

[15] House Journal, p. 74; Annals, pp. 463–466. The Journal appears to be defective in its record as to these resolutions, but the Annals seem to make certain that these resolutions were agreed to.

[16] Senate Journal, p. 392; Annals, p. 44.

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On motion,

Resolved, That William Blount be taken into the custody of the Messenger of this House until he shall enter into recognizance, himself in the sum of $1,000, with two sufficient sureties in the sum of $500 each, to appear and answer such articles of impeachment as may be exhibited against him by the House of Representatives on Monday next.

A message was sent informing the House of Representatives of this action.[17]

On July 10 the Senate Journal records: [18]

Agreeably to the order of the Senate the within-mentioned William Blount having entered into recognizance, I have returned the same into the office of the Secretary of the Senate.

Ordered, That it be entered on the Journal of the Senate that William Blount failed making his appearance this day, agreeably to the recognizance entered into on the 8th instant.

2299. Blount's impeachment, continued.

A recess of Congress intervened between the impeachment of Blount and the framing of the articles of impeachment.

On July 10 [19] in the House, it was:

Ordered, That Mr. Dana be excused from serving on the committee appointed to prepare and report articles of impeachment against William Blount, a Senator of the United States, and that Mr. Bayard be appointed of the said committee in his stead.

On July 10 the Congress adjourned until the second Monday in November next.

2300. Blount's impeachment, continued.

The committee appointed to prepare articles of impeachment in the Blount case reported the evidence, and later the articles.

The articles of impeachment in Blount's case were considered by the House and not by the Committee of the Whole.

After considering English precedents the House chose the managers of the Blount impeachment by ballot.

In choosing managers by ballot the House guarded against complications in case more than the required number should have a majority.

A manager in impeachment proceedings is excused from service by authority of the House.

The managers carry the articles of impeachment to the Senate in accordance with a resolution agreed to by the House.

On December 4, 1797,[20] at the second session of Congress, Mr. Sitgreaves from the committee appointed to prepare articles of impeachment, submitted a report from which the injunction of secrecy was removed, and which was read in House on December 5 and ordered to lie on the table. This report did not embody the articles of impeachment, but simply set forth the facts, documents, subpoenas, etc., resulting from the investigation.[21]

On January 18 and 22, 1798,[22] Mr. Sitgreaves submitted supplementary reports, one representing an additional deposition and the

[17] House Journal, p. 74.
[18] Senate Journal, p. 393; Annals, p. 44.
[19] House Journal, p. 75.
[20] Second session Fifth Congress, Journal, pp. 96, 97; Annals, pp. 672–679.
[21] For the report in full, with exhibits, see Annals, vol. 5, part 2, pp. 2319–2415.
[22] Journal, pp. 135, 144; Annals, pp. 847, 890.

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other two letters received by the committee. They were read to the House and ordered to lie on the table.

On January 25, 1798,[23] Mr. Sitgreaves, from the committee, reported the articles of impeachment, which were considered in Committee of the Whole, and on January 29 were agreed to by the House.

Thereupon, on motion of Mr. Sitgreaves:

Resolved, That eleven managers be appointed, by ballot, to conduct the said impeachment on the part of this House.

As to the method of appointment there was some debate.[24]

Mr. Sitgreaves said, with respect to the manner of appointing managers, he left it to the discretion of the House. The British House of Commons appointed their managers of impeachment by ballot, as they did all their large committees. In this House a different course was taken with respect to committees: they were always appointed by the Speaker, except specially ordered otherwise. The former committee on this business was appointed by the Speaker. He was not disposed to deviate from the usual practice. If, however, any gentleman wished to move that they be appointed by ballot, such a motion, he supposed, would be in order.

Mr. Albert Gallatin, of Pennsylvania, thought the rule directing the appointment of committees did not apply in the present case. It was true that managers of conferences of the Senate were thus chosen, but he thought there was an essential difference between the two cases. Managers of conferences reported to the House similarly with committees, and in fact they were a committee, though called by a different name. But managers of an impeachment on the part of this House appeared to him to be quite a different thing. They were not to make a report to the House which might be affirmed or negatived; they were the representatives of the House, and what they did would be final. Under this impression, in order to take the sense of the House upon the business, he moved that the managers be elected by ballot.

The motion that the managers be appointed by ballot was agreed to by the House.

On January 30[25] Mr. Sitgreaves, in view of the fact that the House should determine whether the choice should be determined by majority or plurality, offered the following resolution, which was agreed to:

Resolved, That in the ballot for managers to conduct the impeachment against William Blount, on the part of this House, a majority of the whole number of votes shall be necessary to a choice; and if it should happen that more than eleven members shall have a majority, that, in that case, the eleven highest in votes shall be considered as chosen; and if any two or more having a majority of votes should be equal in number, so as that the plurality can not be determined among them, the same shall be decided by a new ballot, subject to the preceding rules.

Proceeding to ballot, the House, on this and the succeeding day, chose the following managers:

Messrs. Sitgreaves; James A. Bayard, of Delaware; Harper; William Gordon, of New Hampshire; Thomas Pinckney, of South Carolina; Dana; Samuel Sewall, of Massachusetts; Hezekiah L. Hosmer, of New York; John Dennis, of Maryland; Thomas Evans, of Virginia; and James H. Imlay, of New Jersey.

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[23] Journal, pp. 149–153; Annals, pp. 919, 947–951.
[24] Annals, p. 952.
[25] Journal, p. 154; Annals, p. 953.

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Mr. Baldwin, who had been elected a manager, was excused by the House.

On February 2 [26] it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

2301. Blount's impeachment continued.

The ceremonies of presenting to the Senate the articles of impeachment of William Blount in 1797.

Rules established by the Senate to prescribe ceremonies for receiving House managers presenting articles in Blount's case.

Form of proclamation made in the Senate on attendance of House managers to present articles of impeachment against William Blount.

Upon receiving notice from the House that the managers would present articles against William Blount, the Senate set a time and informed the House thereof.

The managers who presented the articles impeaching William Blount were attended by some Members of the House.

Announcement of the chairman of the House managers in presenting to the Senate the articles against William Blount.

The manager having read the articles impeaching William Blount, the Sergeant-at-Arms received them and laid them on the Senate table.

Form of declaration of Vice-President upon presentation of articles of impeachment in Blount's case.

On February 5,[27] in the Senate, the following rules were agreed to:

Resolved, That the Doorkeeper of the Senate be, and he is hereby, invested with the authority of Sergeant-at-Arms, to hold said office during the pleasure of the Senate, whose duty it shall be to execute the commands of the Senate, from time to time, and all such process as shall be directed to him by the President of the Senate.

Resolved, That for regulating the proceedings of the Senate in cases of impeachment the following rule be adopted, viz:

When the House of Representatives, or managers by them appointed for that purpose, shall attend the Senate to present articles of impeachment, the President of the Senate shall cause proclamation to be made in the form following, viz:

All persons are commanded to keep silence while the Senate of the United States are receiving articles of impeachment against —— ——, on pain of imprisonment.

And shall then signify to the managers that the Senate are ready to receive the articles of impeachment, which, having been read by one of the managers, shall be received by the Secretary; and the managers shall thereupon be informed by the President that the Senate will take proper order on the subject, of which due notice will be given to the House of Representatives.

After which the Secretary shall read said articles of impeachment and enter the same on the Journals of the Senate.

On February 7,[28] in the Senate, a message, ordered to be sent by the House, was received from the House by its clerk, who said:

Mr. President: The House of Representatives have resolved that articles agreed by the House to be exhibited by them, in the name of themselves and of all the

[26] House Journal, p. 160.
[27] Senate Journal, p. 433; Annals, p. 498.
[28] Senate Journal, p. 435; Annals, p. 498.

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people of the United States, against William Blount, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers, Messrs. Sitgreaves, Bayard, Harper, Gordon, Pinckney, Dana, Sewall, Hosmer, Dennis, Evans, and Imley, appointed to conduct the said impeachment.

On motion,

Resolved, That the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against William Blount, late a Senator of the United States from the State of Tennessee, to be presented by the managers appointed by the House of Representatives.

This was the same day communicated to the House by a message borne from the Senate by its Secretary.[29]

Mr. Sitgreaves having stated that it was usual on all solemn occasions like this for the House to give sanction to its managers by an attendance at the time, the managers of the impeachment, accompanied by some of the Members of the House, accordingly went up to the Senate for the purpose of exhibiting the articles of impeachment against William Blount.[30]

Later, in the Senate,[31] a message was announced from the House of Representatives by the above-mentioned managers, who, being introduced, and all but the chairman being seated,[30] Mr. Sitgreaves, their chairman, addressed the Senate as follows:

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

The Vice-President then ordered the Sergeant-at-Arms to proclaim silence, after which he notified the managers that the Senate was ready to hear the articles of impeachment; whereupon,

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

The Vice-President[32] then said:[30]

Gentlemen, managers on the part of the House of Representatives: The Senate will take such order on the articles of impeachment which you have exhibited before them as shall seem to them proper, of which due notice will be given to the House of Representatives.

Upon which the managers and Members attending then retired.

2302. Blount's impeachment continued.

The articles in impeachment of William Blount.

The articles in the Blount impeachment were signed by the Speaker and attested by the Clerk.

The articles of impeachment in the Blount case appear in the House Journal on the day of their adoption, and in the Senate Journal on the day of their presentation.

The Secretary of the Senate then read the articles of impeachment, as follows:

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[29] House Journal, p. 163.
[30] Annals, p. 970.
[31] Senate Journal, p. 435; Annals, p. 499.
[32] Thomas Jefferson, of Virginia, Vice-President.

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ARTICLES EXHIBITED BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, IN THE NAME OF THEMSELVES AND OF ALL THE PEOPLE OF THE UNITED STATES, AGAINST WILLIAM BLOUNT, IN MAINTENANCE OF THEIR IMPEACHMENT AGAINST HIM FOR HIGH CRIMES AND MISDEMEANORS.

ARTICLE 1. That, whereas the United States, in the months of February, March, April, May, and June, in the year of our Lord 1797, and for many years then past, were at peace with His Catholic Majesty, the King of Spain; and whereas, during the months aforesaid, His said Catholic Majesty and the King of Great Britain were at war with each other; yet the said William Blount, on or about the months aforesaid, then being a Senator of the United States, and well knowing the premises, but disregarding the duties and obligations of his high station, and designing and intending to disturb the peace and tranquillity of the United States, and to violate and infringe the neutrality thereof, did conspire, and contrive to create, promote, and set on foot, within the jurisdiction and territory of the United States, and to conduct and carry on from thence, a military hostile expedition against the territories and dominions of His said Catholic Majesty in the Floridas and Louisiana, or a part thereof, for the purpose of wresting the same from his Catholic Majesty, and of conquering the same for the King of Great Britain, with whom His said Catholic Majesty was then at war as aforesaid, contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligations of neutrality, and against the laws of the United States, and the peace and interests thereof.

[Then follows article 2, reciting that the said William Blount "did conspire and contrive to excite the Creek and Cherokee nations of Indians then inhabiting within the territorial boundary of the United States, to commence hostilities against the subjects and possessions of His Catholic Majesty," and article 3, reciting that the said Blount did "further conspire and contrive to alienate and divert the confidence of the said Indian tribes or nations from the said Benjamin Hawkins, the principal temporary agent aforesaid, and to diminish, impair, and destroy the influence of the said Benjamin Hawkins with the said Indian tribes, and their friendly intercourse and understanding with him, contrary to the duty of his trust and station as a Senator of the United States, and against the ordinances and laws of the United States, and the peace and interests thereof;" and article 4, reciting a similar attempt to seduce James Carey from his duty; and article 5, reciting similar efforts to foment disaffection among the Cherokee Indians toward the Government of the United States.]

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

Signed by order and in behalf of the House.

JONATHAN DAYTON, *Speaker.*

Attest:

JONATHAN W. CONDY, *Clerk.*

These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on January 29,[33] the day of their adoption, and in the Senate Journal on February 7,[34] the day they were presented and read.

[33] House Journal, p. 151.
[34] Senate Journal, p. 435.

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2303. Blount's impeachment continued.

Form of oath administered to Senators sitting for the impeachment of William Blount.

The Senate decided in the Blount impeachment that the oath might be administered by the Secretary and President without authority of law.

The Senate decided in the Blount impeachment that the Secretary should administer the oath to the President, and the President to the Senators.

On February 9 [35] the Senate considered the report of a committee appointed to determine the mode of administering oaths in cases of impeachment. This committee reported the following:

Resolved, That the oath or affirmation required by the Constitution of the United States to be administered to the Senate, when sitting for the trial of impeachment, shall be in the form following, viz:

"I, A B, solemnly swear (or affirm, as the case may be), that in all things appertaining to the trial of the impeachment of ———————— I will do impartial justice, according to law."

Which oath or affirmation shall be administered by the Secretary to the President of the Senate, and by the President to each member of the Senate.

On motion that the report be amended by adding thereto these words "and that a bill be brought in conformable thereto," there were yeas 8, nays 20. Then, by a vote of 22 yeas to 6 nays, the resolution was agreed to as reported. On February 14 [36] the Senate postponed a bill regulating certain proceedings in case of impeachment, and on February 20 the bill failed to pass.

2304. Blount's impeachment, continued.

Form of the writ of summons issued for the appearance of William Blount to answer articles of impeachment.

Rule of the Senate prescribing method of service of writ of summons on William Blount.

In the Blount impeachment the Secretary was directed to serve the summons sixty days before the return day.

The Senate in its writ of summons in the Blount impeachment fixed respondent's appearance at the next session of Congress.

The Senate communicated to the House its form of summons in the Blount impeachment, and it was entered in the House Journal.

In the Blount impeachment the House, in conference, asked of the Senate an earlier return day of the summons, but the request was denied.

Instance of a conference on a subject of procedure in an impeachment.

On March 1 [37] the Senate concluded consideration of the report made on February 27 by Mr. Samuel Livermore,[38] of New Hampshire, from the committee to whom the subject had been recommitted on February 23, and, by a vote of yeas 22, nays 5, agreed to it as follows:

The committee to whom was recommitted the report of the committee appointed to prepare rules of proceeding in the case of the impeachment against

[35] Senate Journal, p. 438; Annals, p. 503.
[36] Senate Journal, pp. 441, 448.
[37] Senate Journal, pp. 447, 448; Annals, p. 514.
[38] The other members of the committee were Messrs. James Ross, of Pennsylvania, and Richard Stockton, of New Jersey.

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William Blount, report, in part, that a writ of summons issue, directed to the said William Blount, in the form following:

"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States of America to William Blount, late a Senator of the United States for the State of Tennessee, greeting: Whereas the House of Representatives of the United States of America did, on the 7th day of July last past, in their own name, and in the name of all the people of the United States, impeach you, the said William Blount, of high crimes and misdemeanor before the Senate of the United States: And whereas the said House of Representatives did, on the 7th day of February, of the present year, exhibit to the Senate their articles of impeachment against you, the said William Blount, charging you with high crimes and misdemeanors, therein specially set forth (a true copy of which articles of impeachment is annexed to this writ), and did demand that you, the said William Blount, should be put to answer the said crimes and misdemeanors; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice—you, the said William Blount, are therefore summoned to be and appear before the Senate of the United States of America, at their Chamber, in the city of Philadelphia, in the State of Pennsylvania, on the third Monday of December next, at the hour of 11 of that day, then and there to answer the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the said United States. And hereof you are in nowise to fail. Witness, the honorable Thomas Jefferson, esq., Vice-President of the United States of America, and President of the Senate thereof, at the city of Philadelphia, the 1st day of March, in the year of our Lord 1798, and of the independence of the United States the twenty-second.

"Which summons shall be signed by the Secretary of the Senate.

"That the said summons shall be served on the said William Blount by the Sergeant-at-Arms of this House, or a special messenger, who shall leave a true copy of the writ and the articles annexed with the said William Blount, if he can be found, showing him the original; or at the usual place of residence of the said William Blount, if he can not be found. Which messenger shall make return of the writ of summons, and of his proceedings in virtue thereof, to the Senate, on the appearance day therein mentioned.

"And that a message be sent to the House of Representatives, giving information that the Senate have directed the said writ to be issued, and of the day mentioned therein for the appearance of the said William Blount."

It was then

Resolved, That the Secretary of the Senate do issue the summons hereinbefore directed, and that service thereof be made sixty days at the least before the return day mentioned in the said writ of summons.

This report was communicated to the House by message and appears in full on the Journal of that body.[39] The following order was then agreed to:

Ordered, That the said proceedings of the Senate be referred to the managers appointed on the part of this House to conduct the said impeachment against William Blount, with instructions to inquire and report whether any, and, if any, what provisions are necessary to be made by law for regulating proceedings in cases of impeachment.

On April 6[40] Mr. Sitgreaves, from the managers, reported the following resolutions, which were agreed to:

Resolved, That a conference be desired with the Senate on the subject of their resolution of the 1st of March last, relative to the impeachment of William Blount, and that the managers appointed to conduct the said impeachment be the managers for this House at the proposed conference.

Resolved, That the managers of this House do request, at the said conference, that the Senate will appoint a day, during the present session of Congress, for

[39] House Journal, p. 211.
[40] House Journal, pp. 253, 254; Annals, pp. 1376, 1377.

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the return of the summons directed by their resolution of the 1st of March aforesaid, to be issued to the said William Blount.

On April 9,[41] in the Senate,

Resolved, That they do agree to the proposed conference, and that Messrs. Ross and Livermore be managers at the same on the part of the Senate.

On April 13,[42] Mr. Bayard, from the managers appointed on the part of the House, submitted the following report, which was laid on the table:

That they laid before the conferees appointed by the Senate the resolution of the 6th instant, requesting the appointment of a day during the present session of Congress for the return of the summons against the said William Blount, the reasons upon which the said resolution was founded; and were assured by the conferees that the said request and the reasons for making it, suggested by the managers, should be reported and submitted to the Senate.

This report was ordered to lie on the table.

In the Senate, on April 16,[43] Mr. Ross, from the conferees, made a report; whereupon, it was

Resolved, That it is not, at this time, expedient to alter the return day of the summons directed to be issued to William Blount, so as to make it returnable in the present session of Congress as requested by the managers of the House of Representatives, there being no certainty that it will continue long enough to afford reasonable time for a proper service and return of this process.

On April 16[44] this resolution was communicated to the House by message, and was read and ordered to lie on the table.

2305. Blount's impeachment, continued.

In Blount's impeachment the return of service of the summons was filed in the Senate before the day set for the appearance.

In the Blount impeachment a letter from respondent's attorneys announcing their readiness to attend was filed in the Senate before the day set for appearance.

In the Senate on December 6, 1798,[45] in the next and third session of the Congress, "the return of service on the summons to William Blount, made by the Sergeant-at-Arms, pursuant to the resolution of the Senate of the 1st of March last, was read." This is the entry of the Senate Journal, which does not give the return in full.

Then the President communicated a letter from Jared Ingersoll, esq., stating that he, together with A. J. Dallas, esq., were employed as counsel for William Blount, and that they were ready to attend the trial when ordered by the Senate. This letter does not appear in full in the Senate Journal.

2306. Blount's impeachment, continued.

A manager of an impeachment having accepted an incompatible office, the House chose a successor.

The chairman of managers of an impeachment having ceased to be a Member, the next in order succeeded to the chairmanship.

In the House, on December 13,[46] Mr. Harper, in the absence of

[41] Senate Journal, p. 469; Annals, p. 537.
[42] House Journal, p. 261; Annals, p. 1412.
[43] Senate Journal, p. 472; Annals, p. 541.
[44] House Journal, p. 263.
[45] Third session Fifth Congress, Senate Journal, p. 558; Annals, p. 2190.
[46] Third session Fifth Congress, House Journal, p. 406; Annals, pp. 2440, 2411.

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Mr. Bayard, "the present chairman" of the managers,[47] offered the following, which was agreed to:

Resolved, That another Member be appointed, by ballot, as one of the managers to conduct the impeachment against William Blount, in the room of Mr. Sitgreaves, appointed a commissioner of the United States, under the sixth article of the treaty of amity, commerce, and navigation, with Great Britain.

The House accordingly chose Mr. John Wikes Kittera, of Pennsylvania.

2307. Blount's impeachment, continued.

The Senate, by message, informed the House that the summons had been served on William Blount and a return made thereon to the Secretary's office.

Rules adopted by the Senate for reading the return, calling the impeachment.

In the first impeachment the Senate by rule described itself as a court of impeachment.

Impeachment trials in the Senate have from the first been recorded in a separate journal.

Form used by the Sergeant-at-Arms in calling William Blount to appear and answer articles of impeachment.

Form of return of writ of summons in Blount impeachment.

William Blount appeared neither in person nor by attorney to answer the articles of impeachment.

The House did not attend the return of summons to William Blount to appear and answer articles of impeachment.

In the Senate on December 13:[48]

Ordered, That the Secretary notify the House of Representatives that the summons issued by order of the Senate of the United States against William Blount, on the 1st day of March last, to appear at their bar on the third Monday of December instant and answer to the impeachment made by the House of Representatives, for high crimes and misdemeanors, has been duly served on the said William Blount by the Sergeant-at-Arms, and a return thereon is made to the office of the Secretary of the Senate.

This message was received in the House on the same day.

On December 17,[49] In the Senate, Messrs. James Ross, of Pennsylvania; Jacob Read, of South Carolina, and Samuel Livermore, of New Hampshire, were appointed to report rules for conducting the trial of impeachment and reported—

That the legislative and executive business of the Senate be postponed, and that the Senate form itself into a court of impeachment by taking the oath prescribed by a resolution of this House on the 9th of February, last.

After the oath has been administered to the President and Senate, the process which, on the 1st of March last, was directed to be issued and served upon William Blount, and the return made thereupon, shall be read. The officer who served the process shall be sworn to the truth of the return thereof. The defendant, William Blount, shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, his appearance shall be recorded. If he does not appear, his default shall be recorded.

The House of Representatives shall be notified of the appearance or default of the defendant, William Blount, and that the Senate will be ready at 12 o'clock to-morrow to receive the managers appointed by that House, and to take further order in this trial.

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[47] Mr. Bayard was second on the committee of managers and apparently succeeded to the position without election, although such usage was not incorporated in the rule until 1804.
[48] Senate Journal, p. 563; Annals, p. 2194.
[49] Senate Journal, p. 565; Annals, p. 2196.

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The report was adopted, and the Senate "formed itself into a court of impeachment accordingly." The daily Journal of the Senate does not record the proceedings of the court of impeachment,[50] but they were as follows on this day:[51]

On this day the Senate formed itself into a high court of impeachment, in the manner directed by the Constitution, and the oath prescribed was administered to the Senators present. The process issued on the 1st of March last against William Blount, together with the return made thereon, was read, and the return was sworn to as follows:

"James Mathers, Sergeant-at-Arms of the Senate of the United States, maketh oath that, in obedience to the within summons, he did repair to the usual place of residence of the within-named William Blount, at Knoxville, in the State of Tennessee, and on the 27th day of August, in the present year, did then leave a true copy of the said writ of summons, and of the articles of impeachment annexed, with the wife of the said William Blount, he not being to be found; and that, on the next day, meeting with the said William Blount at the Blue Springs, the deponent showed and read the said original writ to the said William Blount, and informed him that he had left a copy at the usual place of his residence.

"JAMES MATHERS."

The doors of the court were then opened by order of the President, and by his order the Sergeant-at-Arms called the said William Blount three several times, in the words following, to appear and answer:

"Hear ye! Hear ye! Hear ye!

"William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives."

William Blount not appearing, the court adjourned till 12 o'clock to-morrow.

2308. Blount's impeachment, continued.

The House being informed that William Blount had failed to appear and answer the articles, instructed the managers to ask of the Senate time to prepare proceedings.

After William Blount had failed to appear and answer, counsel were admitted on his behalf.

William Blount having failed to appear and answer, the House, after discussing English precedents, declined to ask that he be compelled to appear.

The House declined to instruct its managers as to further proceedings after William Blount had failed to appear and answer.

In the House on December 18,[52] a message was received from the Senate notifying the House that William Blount, impeached of high crimes and misdemeanors before the Senate, by this House, though he had been duly summoned, had not appeared at the bar of the Senate at the time appointed; and that the Senate would be ready to receive the managers at 12 o'clock this day, to take further order in this trial.

On motion of Mr. Harper, this message was referred to the managers of the impeachment, who had leave to sit during the session of the House.

Later, on the same day, Mr. Harper reported, and in accordance therewith it was—

Resolved, That the said managers do attend before the Senate, at 12 o'clock this day, and request a further day for preparing their proceedings in the said impeachment.

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[50] The Senate kept in journal form a "Record of the Proceedings of the High Court of Impeachment on the Trial of William Blount," which was published separately at a later date. Senate Journal, Eighth Congress, pp. 484–491.

[51] Annals, p. 2245.

[52] House Journal, p. 415; Annals, p. 2458.

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In the Senate, on December 18,[53] Messrs. Ross, Livermore, and Stockton were appointed to a committee to take into consideration and report what rules were necessary to be adopted on the trial of the impeachment.

On the same day the Senate resolved itself into a court of impeachment, wherein occurred the following proceedings:[53]

The President communicated a letter, signed "Jared Ingersoll and A. J. Dallas," praying to be admitted to appear as counsel for the defendant. It was accordingly so ordered, and that the House of Representatives be informed thereof.

The managers on the part of the House of Representatives and the defendant's counsel appeared at the bar.

On motion of Mr. Harper (in the absence of Mr. Bayard, the chairman), in behalf of the managers that further time be allowed them to prepare their proceedings in the case, it was,

"*Ordered*, That they have time till Monday next, at 12 o'clock, for that purpose."

The court adjourned till that time.

In the House, on December 20,[54] Mr. Harper submitted the report of the managers, which was as follows:

That, pursuant to the resolution of this House, of the 18th instant, they did attend before the Senate of the United States, and request a further day for preparing their proceedings in the said impeachment; whereupon, a further day was granted till Monday next, at 12 o'clock.

That the managers, having carefully considered the subject, are of opinion that it is neither consistent with the solemnity which ought to attend this high constitutional proceeding, nor with the principles, which, as far as they have been able to discover, have invariably obtained in impeachments, and all other trials of a criminal nature, to proceed to trial against the defendant in this case in his absence; and that the said William Blount, having failed to make personal appearance, as has been notified to the House by the above-mentioned message from the Senate, the next step, on the part of this House, ought to be a motion before the Senate that further order be taken by them for compelling his personal appearance at their bar, to answer to the articles of impeachment exhibited against him by this House.

The managers, however, do not think it proper for them to take a step involving so important a principle without the direction of the House, for the purpose of obtaining which, they beg leave to submit to its consideration the following resolution:

"*Resolved*, That the managers appointed, on the part of this House, to conduct the impeachment against William Blount, late a Senator of the United States, be instructed to request, at their next attendance before the Senate, that further order be taken for compelling the personal appearance of the said William Blount, to answer to the articles of impeachment exhibited against him on the part of this House."

On the next day the House debated the report at length. It appeared that the managers were nearly unanimous in favor of their report, but it was vigorously assailed in the House. Mr. Harrison G. Otis, of Massachusetts, opposed:

Mr. Otis said he did not know what had been the rule observed in similar cases in England; he had not had leisure to examine; nor did he think we ought to be bound by British precedents in a case of this kind. It is, said he, a new case, and he saw no difficulty in determining to prosecute this man to conviction, and in obtaining for him the punishment which he deserves. There is some analogy between this process and a process (well known in common law) against a man's property, distinct from his person. Every one knows that such a prosecution is a prosecution of forfeiture. For instance, we libel a vessel, and notice is given to all the parties to defend. If they do not appear, judgment and execution are obtained.

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[53] Annals, p. 2245.
[54] House Journal, pp. 416, 417; Annals, pp. 2469–2487.

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The present process is against the office of William Blount; it has nothing to do with his person; he is afterwards liable to a prosecution at common law for any crime which he may have committed.

Mr. Samuel W. Dana, of Connecticut, also supported this view:

Let gentlemen who say that a person, in a case like the present, should be required to appear, answer, if a sentence can neither affect a man's person nor his property, why he should appear in person? If a man were liable to be punished with imprisonment, fine, or ransom, his person ought to be secured; and it is because courts will have security, that in such cases persons are either imprisoned or held by efficient bail is refused, it is where it does not afford a sufficient security. Is any such security required in this case? asked Mr. Dana. There is not. The process would be a rare one if the party were required to appear.

The Constitution, continued Mr. Dana, has proceeded on a different principle. The process in cases of impeachment in this country is distinct from either civil or criminal—it is a political process, having in view the preservation of the Government of the Union. Impeachments under the British Government are wholly different from impeachments carried on under this Government. The Constitution proceeds on the high authority of public opinion and of the high value of reputation to every man who is a candidate for public office, and that the declaration of public reprobation, expressed by the constitutional organ, is one of the severest punishments. It considers that the punishment of fine and imprisonment may be endured, but that public abhorrence is not to be borne.

The punishment in this case therefore is wholly a declaration of public opinion, not only that the person receiving it has proved himself unworthy of his present office, but that there is such a baseness attached to his character as to render him unfit for any office in future. Taking the matter up in this view, the propriety of not considering the offense as criminal will clearly appear. Were the offense to be considered as a crime merely, the judgment of the court should involve the whole punishment; whereas, it has no connection with punishment or crime, as, whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law. This process therefore is perfectly sui generis—equally unknown to the British Government or to this country.

Upon this view of the subject, Mr. Dana said his opinion was, that the House ought to instruct the managers, but in a way directly opposite to that proposed by the resolution under consideration.

Mr. Dana also cited the case of Robert Tresylliam and others, tried before the British House of Lords in 1388, in support of his opinion, but it was alleged in opposition that this precedent had been highly censured by English law writers.

Mr. Harper defended the report of the managers:

It had been the practice, from the earliest records of our jurisprudence to the present time, that a man shall never be tried in his absence for a criminal offense. Gentlemen say the reason for this is, that he may be ready to receive judgment. If so, it would be foolish, because the court might direct the person of a criminal to be brought before them to receive sentence as well as they could do it before his trial. What, then, said he, is the reason? Ask the great sages of the English law, and they will give an answer very different from his learned friends. They will say that it is because a man ought always to be face to face with his judges and accusers; that no witness ought to be heard against a man, or his life or property put in jeopardy, without his personal presence; and so sacred is the principle held that a man is not permitted to depart from it. This is not a solitary instance in which personal convenience is sacrificed to natural convenience; this is frequently the case, in order to make sure the barriers which protect individual security. It is in this respect that our jurisprudence is chiefly distinguished from the inquisitorial proceedings of former times, where a man might be found guilty of the highest crimes without knowing who were his accusers, witnesses, or judges. It is by this sacred maxim that no man can be put in jeopardy without being confronted by his accusers. And shall we, said he, depart from this principle? Why shall we do this? Because the judgment to be awarded in this case does not extend to person or property? Is the judgment less than if it affected person or property? Gentlemen will not say so. They will say that a man's reputation is the dearest possession which he can enjoy; and certain he was that gentlemen who are opposed in opinion to him on this subject would

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sooner be deprived of their property or personal liberty than lose their fame and reputation. It was, in his opinion, the highest punishment that could be inflicted upon a man of worth.

The House disagreed to the resolution proposed by the managers, yeas 11, nays 69.

Mr. Samuel Sewall, of Massachusetts, one of the managers, in order that there might be positive instructions from the House, proposed this resolution:

Resolved, That the managers appointed on the part of this House for conducting the impeachment against William Blount proceed in the prosecution of the said impeachment, although William Blount shall not appear in person to answer to the same.

It was urged against this resolution that it was improper to give any instructions at all and that the Senate should be left to proceed as they should think proper.

The resolution was disagreed to, ayes 37, noes 46.

2309. Blount's impeachment, continued.

Rule adopted by the Senate for the trial of William Blount in 1797.

The rule providing for the putting in of the answer or plea in the Blount case.

The rules in the Blount case provided that respondent's answer should be communicated to the House of Representatives.

The Senate rules in the Blount case required that respondent's answer should be spread on the journal.

The Senate rules in the Blount case provided that all questions arising should be decided in secret session and by yeas and nays.

Form of oath and mode of examination of witnesses prescribed in the Blount impeachment.

It was provided in the Blount case that Senators called as witnesses should be sworn and testify standing in their places.

The Senate communicated to the House its rules for the trial of William Blount; and they appear in the House Journal.

The Senate decided that the counsel for William Blount need not file any warrant of attorney or other written authority.

During proceedings in impeachment before the Senate the President pro tempore presides during temporary absence of the Vice-President.

In the Senate, on December 20,[55] Mr. Ross, from the committee appointed to prepare rules, made a report which, after amendment, was on December 21 agreed to, as follows:

Resolved, That at the next opening of the court of impeachment the President shall inquire whether the managers have any request to make before the counsel of the defendant are called on to put in his answer.

If no motion or request is made, the defendant's counsel shall be required to put in his answer or plea to the articles of impeachment.

The answer or plea shall be read by the Secretary and entered by him on the Journal.

A copy of the defendant's answer or plea shall be communicated to the House of Representatives by the Secretary.

The President shall then inform the managers that the Senate is ready to hear any reply or motion which they may think proper to make.

[55] Senate Journal, p. 566; Annals, p. 2197.

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All questions, arising in the course of the trial, shall be decided with closed doors. The decisions shall be by ayes and noes, which shall be entered upon the Journal. When the question is decided, the doors shall be opened, the parties called in, and the result made known to them by the President.

Witnesses shall be sworn by the Secretary, and shall take the following oath:

"I, A, B, do swear (or affirm, as the case may be) that the evidence I will give to this court, touching the impeachment of William Blount, now here depending, shall be the truth, the whole truth, and nothing but the truth. So help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form. If a Senator wishes any question to be asked, it shall be put by the President.

If Senators are called as witnesses, they shall be sworn, and give their testimony standing in their places.

It was also—

Ordered, That the Secretary inform the House of Representatives that the Senate, taking into their care the ordering of the trial of William Blount, late a Senator of United States from the State of Tennessee, on Monday, the 24th of December instant, have prepared some rules to be observed at said trial, which they have thought fit to communicate to the House of Representatives.

The message was accordingly delivered in the House, and the rules appear in full in the House Journal of December 21.[56]

On December 24 [57] the Senate resolved themselves into a court of impeachment whereupon the proceedings were as follows:

The manager and counsel attended as on the 18th instant.

On the motion of Mr. Harper, in behalf of the managers, that the counsel exhibit and file the power, or powers, by which they are authorized to appear in behalf of William Blount, and that the managers be furnished with a copy thereof.

Mr. Dallas, one of the counsel, exhibited sundry letters to the President, which, he alleged, contains the powers and also the confidential instructions of Mr. Blount to his counsel.

The court was cleared in order to take into consideration the motion made by the managers of the impeachment; and, on the motion that it be ruled.

"That the court having, on the 18th day of the present month, admitted Jared Ingersoll and A. J. Dallas, esqs., to appear and plead for William Blount, to the impeachment now pending against him, and the court having then been satisfied that the said counsel were duly authorized to appear for the said William Blount, are of opinion that it is not necessary that any warrant of attorney, or other written authority, be now filed in this court."

It was determined in the affirmative, 20 to 2.

The managers and counsel being again admitted, the President [58] stated to them the opinion of the court on the motion of the managers, and returned to Mr. Dallas the letters by him exhibited, unopened.

The President then asked the managers if they had further motion to make prior to permission to the counsel for the defendant to file a plea on his behalf.

To which the managers replied in the negative.

2310. Blount's impeachment, continued.

The plea filed by counsel of William Blount in answer to the articles of impeachment.

William Blount, in his plea, demurred to the jurisdiction of the Senate to try him on impeachment charges.

William Blount pleaded that he was not, at the time of pleading, a Senator; and that a Senator was not impeachable as a civil officer.

The plea of William Blount being received by the House of Representatives, was referred to the managers.

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[56] House Journal, p. 416.

[57] Annals, p. 2246.

[58] It is evident that in the absence of the Vice-President the President pro tempore presided. The Vice-President had not attended this session at this time. Senate Journal, p. 567.

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Whereupon the President notified to the counsel that they were permitted to file their plea, which was done by Mr. Ingersoll and read by the Secretary as follows:

UNITED STATES *v.* WILLIAM BLOUNT

Upon impeachment of the House of Representatives of the United States, of high crimes and misdemeanors.

IN THE SENATE OF THE UNITED STATES, *December 24, 1798.*

The aforesaid William Blount, saving and reserving to himself all exceptions to the imperfections and uncertainty of the articles of impeachment, by Jared Ingersoll and A. J. Dallas, his attorneys, comes and defends the force and injury, and says, that he, to the said articles of impeachment preferred against him by the House of Representatives of the United States, ought not to be compelled to answer, because he says that the eighth article of certain amendments of the Constitution of the United States, having been ratified by nine States, after the same was, in a constitutional manner, proposed to the consideration of the several States of the Union, is of equal obligation with the original Constitution, and now forms a part thereof, and that by the same article it is declared and provided, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

That proceedings by impeachment are provided and permitted by the Constitution of the United States, only on charges of bribery, treason, and other high crimes and misdemeanors, alleged to have been committed by the President, Vice-President, and other civil officers of the United States, in the execution of their offices held under the United States, as appears by the fourth section of the second article, and by the seventh clause of the third section of the first article, and other articles, and clauses contained in the Constitution of the United States.

That although true it is, that he, the said William Blount, was a Senator of the United States, from the State of Tennessee, at the several periods in the said articles of impeachment referred to; yet, that he, the said William, is not now a Senator, and is not, nor was at the several periods, so as aforesaid referred to, an officer of the United States; nor is he, the said William, in and by the said articles, charged with having committed any crime or misdemeanor, in the execution of any civil office held under the United States, or with any malconduct in civil office, or abuse of any public trust, in the execution thereof.

That the courts of common law, of a criminal jurisdiction, of the State, wherein the offenses in the said articles recited are said to have been committed, as well as those of the United States, are competent to the cognizance, prosecution, and punishment, of the said crimes and misdemeanors, if the same have been perpetrated, as is suggested and charged by the said articles, which, however, he utterly denies. All which the said William is ready to verify, and prays judgment whether this high court will have further cognizance of this suit, and of the said impeachment, and whether he, the said William, to the said articles of impeachment, so as aforesaid preferred by the House of Representatives of the United States, ought to be compelled to answer.

JARED INGERSOLL.
A. J. DALLAS.

On request of Mr. Harper, in behalf of the managers, that they be allowed a further delay, to wit, until Thursday sennight, to file their replication, it was allowed and the court adjourned at that time.

On December 26 [59] a message from the Senate, by their Secretary, announced:

[59] House Journal, p. 419; Annals, p. 2491.

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Mr. Speaker, the counsel in behalf of William Blount, by permission of the Senate, having filed their plea, I am directed to communicate a copy thereof to the House of Representatives.

This plea, as above given, appears in full in the Journal of the House. It does not appear from the Senate Journal that the Senate itself ordered this message sent. If the court of impeachment ordered it sent, the fact is not noted in the proceedings. But under the rule the Secretary would send it without further order of the Senate or court.

The House:

Ordered, That the said message be referred to the managers appointed on the part of this House to conduct the impeachment against William Blount, with instructions to proceed thereon as they shall deem advisable.

2311. Blount's impeachment, continued.

The House sent to the Senate a replication to respondent's plea; and his counsel presented a rejoinder.

The replication of the House was signed by the Speaker and attested by the Clerk.

In the Blount impeachment the rejoinder on behalf of respondent was signed by his attorneys.

In the Blount impeachment the replication was presented by the House managers, but was read by the Secretary of the Senate.

In the Blount impeachment the Senate dispensed with the requirement for yeas and nays on questions of adjournment and on allowing further time for the parties.

On December 31,[60] in the House, Mr. Bayard, from the managers appointed on the part of this House to conduct the impeachment against William Blount, to whom was referred, on the 26th instant, a message from the Senate communicating a copy of the plea filed by the counsel in behalf of the said William Blount, with instructions to proceed thereon, as they shall deem advisable, made a report, which he delivered in at the Clerk's table, where the same was twice read and agreed to by the House, as follows:

That the replication annexed be put into the said plea on behalf of this House, and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, as such time as shall be appointed by the Senate:

"The replication of the House of Representatives of the United States, in their own behalf, and also in the name of the people of the United States, to the plea of William Blount, to the jurisdiction of the Senate of the United States, to try the articles of impeachment exhibited by them to the Senate against the said William Blount:

"The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against the said William Blount, reply to the plea of the said William Blount, and say, that the matters alleged in the said plea are not sufficient to exempt the said William Blount from answering the said articles of impeachment, because they say that, by the Constitution of the United States, the House of Representatives had power to prefer the said articles of impeachment, and that the Senate have full and the sole power to try the same: Wherefore, they demand that the plea aforesaid of the said William Blount be not allowed, but that the said William Blount be compelled to answer the said articles of impeachment."

It does not appear from the Journals of either the Senate or House that this replication was transmitted to the Senate by message before it was presented in the court of impeachment by the managers.

[60] House Journal, p. 423; Annals, p. 2551.

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In the Senate, on January 3, 1799 [61] it was

Resolved, That in all questions of adjournment of the court of impeachment, as also in all questions on a motion that further time be allowed to the parties, the taking the question by yeas and nays be dispensed with.

Also on January 3 the Senate resolved itself into a court of impeachment, the proceedings of which are recorded: [62]

The court being opened, and the managers and counsel being present.

Mr. Bayard, chairman of the managers, in behalf of the House of Representatives, offered a replication, which was read by the Secretary as follows:

"The replication of the House of Representatives of the United States, in their own behalf. [Here follows the text of the replication as given above.]

"Signed by order, and in behalf of the House.

"JONATHAN DAYTON, *Speaker*.

"Attest:

"JON. W. CONDY, *Clerk*."

Mr. Ingersoll, counsel for the defendant, thereupon presented a rejoiner, which was read by the Secretary, as follows:

"UNITED STATES *v.* WILLIAM BLOUNT.

In the Senate of the United States.

"And the aforesaid William Blount, by Jared Ingersoll and Alexander J. Dallas, his attorneys, says that the matter by him before alleged which he is ready to verify, is sufficient reason in law to show that this court ought not to hold jurisdiction of the said impeachment, and the articles therein set forth; which said matter so as aforesaid by him alleged, the said House of Representatives not having denied or made answer thereto, he prays the judgment of this honorable court, whether they will hold further jurisdiction of the said impeachment or take cognizance thereof, and whether the said William Blount shall make further answer thereto.

"JARED INGERSOLL.
"A. J. DALLAS.

"JANUARY 3, 1799."

It does not appear that this rejoinder was transmitted by message to the House.

2312. Blount's impeachment, continued.

In the Blount impeachment it was arranged that the managers should open and close in arguing respondent's plea in demurrer.

Mr. Bayard, the chairman, having communicated with Mr. Ingersoll, the leading counsel for the defendant, it was agreed between them that the managers should proceed in the argument first on the part of the prosecution, and that the right to reply should belong to the managers, whereupon,

Mr. Bayard rose and proceeded.

At the conclusion of his address Mr. Ingersoll, on behalf of the defendant, moved [63] for further time to reply, and it was allowed until 11 o'clock the next day to which time the court adjourned.

On January 4, [63] the court having convened, Mr. Dallas, in behalf of the defendant, spoke during that day's sitting.

On January 5 [64] the court convened again, Mr. Ingersoll speaking further in defense. Mr. Ingersoll having concluded, Mr. Harper, [65] of the managers, closed.

After Mr. Harper had closed his observations, the Vice-President inquired of the managers if they had any further observations to offer, on

[61] Senate Journal, p. 568; Annals, p. 2199.
[62] Annals, p. 2248.
[63] Annals, p. 2262.
[64] Annals, p. 2278.
[65] Annals, p. 2318.

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which Mr. Bayard, in their behalf requested permission to withdraw for a few moments; and, returning into the court, he replied in the negative.

The argument touched upon five points, although on two of these little stress was laid.

2313. Blount's impeachment continued.

Discussion as to the right to demand a trial by jury in a case of impeachment.

(1) The plea of the respondent had set forth that the power of impeachment as established in the original Constitution had been limited by the eighth amendment. Mr. Bayard, of the managers, answering this, contended that it had no bearing on the question of jurisdiction in this case, whatever it might have should there be a trial. But he further urged that if the contention of the plea were well founded there would be an end of the judicial character of the Senate and it must part with the power expressly given it by the Constitution to try all impeachments. The same rule of construction would require jury trials in courts-martial.[66]

In reply on this point Mr. Dallas, speaking for the respondent, said:

The honorable manager had misunderstood the object of the plea when he supposed it asserted a right to a trial by jury in cases properly impeachable, since the clause to which he referred was merely inserted to show that, unless this was a case in which an impeachment would lie, the party was entitled to a trial by jury in the ordinary courts having cognizance of the matters charged.

2314. Blount's impeachment continued.

Argument that impeachment should not fail simply because the offense may be within jurisdiction of the courts.

(2) The plea that the courts of law were competent to try the cause was answered by Mr. Bayard by calling attention to the fact that no court at common law could give judgment of disqualification; and that the just punishment for the offenses alleged.

He also said:

In the second place, if the suggestion were true it would not be effectual, because by the seventh clause of the seventh section of the first article of the Constitution delinquents shall be liable both to the punishment upon impeachment and that inflicted in the courts of common law. It is no objection to say that the courts have cognizance of the offense, because it is expressly provided that the one punishment shall not be an exemption from the other.

2315. Blount's impeachment continued.

In the Blount impeachment the managers contended, although in vain, that all citizens of the United States were liable to impeachment.

The law of Parliament was referred to in 1797 in discussing the power of impeachment.

(3) The first point of essential importance in the contending arguments of managers and counsel related to the nature of the power of impeachment. Mr. Bayard showed that in no places had the Constitution defined the cases or described the persons who should be objects of impeachment.[67] This, like other portions of the Constitution, left one to seek in the common law the answer to the questions.

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[66] Annals, p. 2250.
[67] Annals, p. 2251.

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The question,[68] therefore, is, what persons, for what offenses, are liable to be impeached at common law? And I am confident, as to this point, the learning and liberality of the counsel will save me the trouble of argument, or the citation of authorities, to establish the position that the question of impeachability is a question of discretion only, with the Commons and Lords. Not that I mean to insist that the Lords have legal cognizance of a charge of a capital crime against a commoner, but simply that all the King's subjects are liable to be impeached by the Commons, and tried by the Lords, upon charges of high crimes and misdemeanors. And this, sir, goes to the extent of the articles exhibited against William Blount. And for my part I do not conceive it would have been sound policy to have laid any restriction as to person upon the power of impeaching.

It is not difficult to imagine a case in which the punishment it imposes would be the most suitable which could be inflicted. Let us suppose that a citizen not in office, but possessed of extensive influence, arising from popular arts, from wealth or connections, actuated by strong ambition, and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption, or force, to place himself in the Presidential chair. I would ask, in such a case, what punishment would be more likely to quell a spirit of that description than absolute and perpetual disqualification for any office of trust, honor, or profit under the Government; and what punishment could be better calculated to secure the peace and safety of the State from the repetition of the same offense?

Mr. Dallas, counsel for the respondent, combated this proposition at length. It was contrary to the "principles of the Federal compact:"[69]

For although it is in some of its features Federal, in others it is consolidated; in some of its operations it affects the people as individuals; in others it applies to them in the aggregate as States; yet, in every view, all the powers and attributes of the National Government are matters of express and positive grant and transfer; whatever is not expressly granted and transferred must be deemed to remain with the people, or with the respective States; and as the motive for establishing the Federal Constitution arose from the want of a competent national authority in cases in which it was essential for the people inhabiting the different States to act as a nation, so far the people gave power to the Federal Government; but the delegation of that power is evidently limited by the reason which produced it.

Mr. Dallas asserted that the United States, as a nation distinguished from the States, had no common law, and that it would be unwise to apply the theory of impeachments taken "from the dark and barbarous pages of the common law" to the existing situation, since it would render the Government dependent upon the laws and usages of a foreign country. The same doctrine would also give the Federal courts jurisdiction beyond the enumerated cases. The doctrine was also inconsistent with the general policy of the law of impeachments, which was to afford a means of reaching offenders who could not be reached by the ordinary tribunals. The doctrine was also inconsistent with a fair construction of the terms of the Constitution itself:

The operative words[70] are express: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."—Art. 2, sec. 4. The previous clauses are only descriptive of the power and distributive of its exercise; declaring that the sole power to institute and the sole power to try impeachments shall belong to the branches of the Legislature respectively. They contain no description of the persons liable to impeachment, nor of the offenses for which the impeachment may be brought. To suppose that they include a jurisdiction over all persons, for all offenses, is to annihilate the trial by jury where a punishment more severe than death to an honorable mind may be inflicted; it is to overthrow all the barriers of criminal jurisprudence;

[68] Annals, p. 2254.
[69] Annals, p. 2263.
[70] Annals, p. 2267.

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for every petty rogue may be tried by impeachment before this high court for every offense within the indefinite classification of a misdemeanor.

The reason of the thing, as well as the expression, shows, however, that the offender must be a civil officer to vest the jurisdiction of impeachment. For every other offender a competent punishment is provided in the ordinary tribunals; but, in the case of a public officer, no sentence strictly judicial, in any common law court, can affect the tenure of his office. In the business of offices, to appoint, to reappoint, or to abstain from reappointing are attributes and exercises of Executive authority; the ordinary judicial authority can not exercise them, nor restrain or regulate their exercise by the proper magistrate. Hence arose the necessity of the judgment in case of a conviction on impeachment, which, by declaring that the delinquent officer shall be removed, and that he shall never be reappointed, affixes, in effect, a check or limitation to the general power of the Executive.

But, if civil officers are not exclusively contemplated, why limit the judgment on impeachment simply to a removal and disqualification? The common law maxim says that no man shall be twice tried for the same offense; and if the Senate may, on any charge against any offender, try the whole merits of the accusation and defense, why restrain them from pronouncing the whole judgment? Why multiply trials, and parcel out jurisdictions, when one trial, one jurisdiction, would accomplish every purpose of justice? There is an appearance of absurdity in the doctrine that can not be overlooked. A private citizen who holds an office may be impeached on the speculation that, at some period of his life, it is possible he should be appointed a public officer. And if any sentence is pronounced it must, in his case, be a perpetual disqualification; whereas, in the case of a man actually in office, the sentence may only extend to a present removal.

Again, if the bare designation of the party who should impeach, and of the party who should try impeachments, creates a jurisdiction over all persons for all offenses, why should the subsequent clause specially name the President, Vice-President, and all civil officers of the United States? They would certainly be included in the general authority; and it can be no answer to say that it was with a view, imperatively, to command their removal on conviction, because the restricted judgment of the Senate points emphatically at their case—a removal from office and a perpetual disqualification. Would not those officers be removed or disqualified for any offense for which a private citizen might be disqualified on impeachment, though it is not one of the enumerated offenses? It is here, likewise, to be remarked that the persons subject to removal are to be "civil officers of the United States," excluding all idea of affecting the station of State officers; and yet State officers as well as private citizens are liable to impeachment before this Senate, according to the present claim of jurisdiction.

Mr. Ingersoll also argued on this point in support of the contention of his colleague.

In concluding for the managers, Mr. Harper replied: [71]

The learned counsel who first replied to my colleague took great pains and displayed much ability to show the pernicious and absurd consequences which would result from adopting the penal common law of England, or the penal code of any State, as a rule of conduct for the Federal Government. But this was merely fighting a phantom; for my colleague contended for no such thing, nor is it in the least necessary for our purpose. We do not wish the Federal Government to adopt the penal laws of England or of any particular State in the Union, but we contend that when a term, borrowed from the law of England, is introduced without comment or explanation into our Constitution or our statutes, every question respecting the meaning of that term must be decided by a reference to the code from whence it was drawn in the same manner as a term in chemistry, or any other science, being introduced into one of our statutes or constitutions, must be explained by a reference to the writers on that science. Surely this is a different thing from adopting the penal code of England or of any particular State as a rule of conduct for the Federal Government.

Mr. Harper further said: [72]

Nor can I conceive how the universal extent of the power of impeachment, contended for by my honorable colleague, is contrary to the spirit, the objects, or

[71] Annals, p. 2298.
[72] Annals, p. 2299.

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the policy either of the law of impeachment or of the Federal Constitution. The use of the law of impeachment is to punish, and thereby prevent, offenses which are of such a nature as to endanger the safety or injure the interests of the United States; and the object of the Federal Constitution was to provide that safety and to protect those interests. Such offenses may be committed as well by persons out of office as by persons in office; and although the punishment can go no further than removal and disqualification, which restriction was, perhaps, wisely introduced in order to prevent those abuses of the power of impeachment which had taken place in another country, yet it may often be extremely important to prevent such offenders from getting into office, as well as to remove them when they are in; and it is, therefore, as consistent with the policy of impeachments and the principles of the Federal compact to punish them in the one case as in the other. This doctrine, it is further said, would enable Congress to interfere with the State governments by impeaching their officers. But those impeachments must be founded on offenses against the United States; and if such offenses were committed by State officers, I can not see why they ought not to be punished as well as in any other case. Surely they would not be less dangerous. If the convictions in such impeachments could remove men from State offices, or disqualify them for holding such offices, there might be something in the objection; but that could not be the case, since the removal and disqualification apply to offices under the General Government alone. * * * But the learned counsel for the defendant have told us that the power of impeachment is limited in the Constitution itself by the restriction which it imposes on the power of punishment. The power of punishment on conviction by impeachment is restricted, say they, to "removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the United States;" and it would be absurd to impeach, try, and convict a man who held no office from which he could be removed, and could, of consequence, be not otherwise affected than by a disqualification to hold in future offices which he, perhaps, never had a prospect of obtaining. Of this absurdity the Constitution cannot be supposed to be guilty; and therefore it could not have intended to subject to the power of impeachment any persons except those who actually hold offices and may be punished by removal.

But where, Mr. President, did the honorable counsel for the defendant learn than disqualification to hold any office of trust, honor, or profit under the Government of our country is no punishment? Would either of those honorable gentlemen think it no punishment in his own case?

2316. Blount's impeachment, continued.

Elaborate argument of the question whether or not a Senator is a civil officer within the meaning of the impeachment clause of the Constitution.

(4) The fourth branch of the discussion involved an inquiry as to whether or not—it being assumed that only officers of the United States might be impeached—a Senator was an officer within the meaning of the Constitution.

Mr. Bayard, for the managers, contended that he acted as a legislator, an executive magistrate, and a judge. The ordinance of Congress for establishing a government for the Northwest Territory, passed in 1787, had contemplated members of the legislature as officers. This use of the word "office" was contemporaneous with the formation of the Constitution.

Furthermore, he contended that a Senator was not only an officer, but was an officer within the meaning of the Constitution itself. He then discussed the following portions as confirmatory of this view:

Article I, section 3, clause 7; Article I, section 6; Article I, section 9, clause 7; Article II, sections 3 and 4.

As to two of these provisions he said: [73]

The first of these is the third section of the second article, which declares that the President shall commission all officers of the United States; and as it

[73] Annals, p. 2258.

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is clearly not designed that he should commission a Senator, it will be inferred that a Senator is not to be considered as an officer.

I humbly trust I can show, that it was not the intention of the Constitution that these words should take effect in their full extent; and I shall submit that they ought to be understood according to the subject to which they apply.

A commission is simply an evidence of authority delegated to a particular person. And surely it is proper that that evidence should show from the same source from which the appointment is derived. By the Constitution the President is made the fountain of office. The officers, properly speaking under the United States are all appointed by him; and it was right, therefore, as the general power of appointing was given to him, that he should also have the general power of commissioning.

It is certain that it was intended that the power of commissioning should not exceed that of appointing, because the President does not commission anyone whom he does not appoint. The provision in question was not intended to define who should be considered as officers, but to introduce a plain and just rule of policy that the power of appointing and commissioning should reside in the same person. The practice under this constitutional regulation, explains its meaning and extent. It is clearly not true that he commissions all officers of the United States. He is an officer himself, and so expressly denominated throughout the second article, and yet he has no commission. It is equally clear that the Vice-President is an officer, and yet not commissioned. Again, the Speaker of the House of Representatives is an officer, as I shall have occasion to show hereafter, but has no commission. And there are also a variety of subordinate officers, appointed by heads of Departments and courts of justice, whom the President does not commission. I am therefore justified in concluding that it does not follow, because a person has no commission from the President, that therefore he is not to be considered as an officer.

There is another objection of a similar nature, arising from the provision in the sixth section of the first article, of which it is probable much use will be made. That section declares that no person holding an office under the United States shall be a Member of either House during his continuance in office. It will therefore be said, if the place of a Senator is an office, this clause is repugnant and absurd.

This provision, I humbly apprehend, has the same limits with the one which I have just adverted to. The intention of it was to erect a barrier between the Executive and legislative departments; to prevent Executive patronage from influencing legislative councils. It was designed therefore to apply solely to the officers of Executive appointment. I am not much disposed, sir, to place reliance in an argument upon so great a subject, upon nice distinctions or verbal criticism; but I think I shall be excused for paying some attention to the peculiar language of the clause in question. The regulation is that no person holding an office under the United States shall be a Member of either House during his continuance in office. The United States here means the Government of the United States, for the United States grants no office but through the Government. Now, it is clear that a Senator is not an officer under the Government. The Government consists of the President, the Senate, and House of Representatives, and they who constitute the Government can not be said to be under it. Besides, a Senator does not derive his authority from the Government. The Senatorial power is an emanation of the State sovereignties; it is coordinate with the supreme power of the United States; in its aggregate, it forms one of the highest branches of the Government. Giving every effect to this section, it would only prove that a Senator is not an officer under the Government of the United States, but still he may be an officer of the United States; and give me leave to say that the distinction which I have here taken is supported by the variance of language to be found in another part of the Constitution.

Mr. Bayard also cited the law of March 1, 1792, enacting that in case of vacancy in the office of President the Speaker of the House of Representatives should exercise the office, as showing that in legislative interpretation the Speaker is an officer.

Mr. Dallas, in replying, discussed the articles of the Constitution referred to by Mr. Bayard, especially to show that a distinction could

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not be drawn between "officers of" and "officers under" the United States. The two terms, in his view, were used indiscriminately.

There were no words in the Constitution extending the impeaching power to a Senator:[74]

The second section of the second article provides, that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, or other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The President having then power to appoint all the officers of the United States, including military as well as civil officers; the the third section of the same article, declaring that "he shall commission all the officers of the United States;" and the fourth section, providing for the removal of all civil officers excluding military officers, on impeachment and conviction; it would seem inevitably to result that no man is an officer of the United States unless he has been appointed and commissioned by the President; and that, therefore, unless he is so appointed and commissioned, he can not be an object of impeachment. Here Mr. Dallas requested that it might be remembered that the provision respecting impeachments was a part of the Executive article of the Constitution; and was immediately connected with the arrangements for making appointments, and issuing commissions, under the authority of the President.

Then Mr. Dallas proceeded to inquire, Does the President nominate or commission Senators or Representatives? No; nor does the Constitution, in any part of it, term them officers, or call their representative station an office. But the honorable manager has said that the latitude to which this position extends would render it necessary that the President should issue a commission to himself, to the Vice-President, and to the Speaker of the House of Representatives, since they are all expressly denominated officers. The Constitution, however, is not chargeable with this absurdity. The President and Vice-President have their commissions from the Constitution itself, and the speaker of the House of Representatives is emphatically an officer of the House, not of the United States. But the objection affords an opportunity to illustrate the meaning of the Constitution. It is provided that the President shall commission all officers, and that all civil officers shall be removed on impeachment and conviction; but the President does not commission himself and the Vice-President, and therefore as it was intended to affect them by the impeachment power, it became necessary expressly to name them. The President does not commission Senators and Representatives; but it was not intended to affect them by the impeachment, and therefore they are not named.

Mr. Dallas continued to analyze various parts of the Constitution, and argued from the operation of them that a legislator never was considered as an officer of the United States, in the ordinary or constitutional acceptation of the term. The sixth section of the first article contains the following passage: "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office." Nothing could more strongly mark the discrimination between a legislator and an officer than the language which is here used. It is declared that no member holding any office shall be a member of either House while he continues in office. If a member was deemed an officer, the phraseology would doubtless have been, "no member holding any other office." Again let it be supposed that previously to the amendment of the Constitution (which merely provides that no law varying the compensation for the services of Senators and Representatives shall take effect until an election of Representatives has intervened) the pay of Senator had been increased by an act of Congress, could not a Representative, who had assisted in passing the act, be chosen a Senator before the expiration of the two years for which he was originally elected? Again let it be supposed that a new State was erected and admitted into the Union; if a Senator is an officer, the office of Senator for the new State would be created during the time for which Congress, who created it, was elected; and yet might not a member of that Congress be chosen a Senator for the new State, before the expiration of the

[74] Annals, pp. 2271–2274.

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time for which he was elected a Representative? When, for instance, Kentucky was separated from Virginia, and erected into a State, was not a Representative elected for Virginia, residing within the boundaries of Kentucky, eligible immediately as a Senator of Kentucky, though he resigned his Representative seat before the term of his election had elapsed?

The first section of the second article likewise pointedly distinguishes between a legislator and a public officer, declaring "that no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." If Senators or Representatives were considered as persons holding offices of profit or trust under the United States, it was superfluous to specify them at all; or, if named, it would have been correct to say, "no Senator or Representative, or person holding any other office of trust or profit," etc. But it is important also to remark that here, where the Constitution intends to work a disqualification, as to Senators and Representatives, they are expressly named; and no sound reason can be offered why they should not have been equally named, if the Constitution had intended to subject them to impeachment. * * * But, Mr. D. contended, that, independent of all precedent and authority, the distinction was founded upon the very nature of a free Government. The legislature is, in theory, the people; they do not themselves assemble, but they depute a few to act for them; and the laws which are thus made are the expressions of the will of the people. Over their Representatives the people have a complete control, and if one set transgress they can appoint another set, who can rescind and annul all previous bad laws. But the power of the people is only to make the laws; they have nothing to do with executing them; they have nothing to do with expounding them; and hence arises the diversity in the modes of remedying any grievance which they may suffer from the conduct of their Representatives or agents. If a legislator acts wrong, he may be expelled before the term for which he was chosen has expired; he may be rejected at the next periodical election; and the laws which he has sanctioned may be repealed by a new representation. But if an executive, or a judicial magistrate, acts wrong, the people have no immediate power to correct; prosecution and impeachment are the only remedies for the evil. Then, it is manifest, that, by the power of impeachment, the people did not mean to guard against themselves, but against their agents; they did not mean to exclude themselves from the right of reappointing, or pardoning; but to restrain the Executive magistrate from doing either with respect to officers whose offices were held independent of popular choice.

The argument that every person who executes an authority is in fact an officer was, in Mr. Dallas's opinion, too broad. The Speaker of the House of Representatives was an officer of the House, but not of the United States. And it was only on being chosen to the chair that he acquired the denomination of officer, contradistinguished from the character of Member.

Mr. Dallas continued further: [75]

From a just consideration of the principles of our Government, it was thus manifest that the moment there was a departure from the immediate choice of the people, the law of impeachment became necessary to secure them from the favoritism, or perverseness of the Executive Magistrate. Impeachment, he observed, is, with respect to executive and judicial officers, what expulsion is with respect to the members of the legislature. As expulsion enables the people to decide whether they will restore the evicted Member to their service, a conviction on impeachment enables the Representatives of the people to decide whether the delinquent shall be partially or totally excluded from the honors and emoluments of public office. But the very circumstance of declaring that a pardon shall not avail in cases of impeachment, though a reelection shall avail in cases of expulsion, demonstrates (as was before intimated) that the people did not mean to guard against the exercise of their own sovereignty, but against an abuse of the power delegated to their agents.

Mr. Ingersoll, speaking also in behalf of the respondent, discussed the extent of the power of impeachment under the Constitution, which as he claimed,[76] was restricted to the President, Vice-President, and civil officers of the United States, for malconduct in office. He stated that he should afterwards endeavor to make it appear that Senators

[75] Annals, p. 2275.
[76] Annals, p. 2282.

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were not the objects of this power, not being comprehended under the designation of civil officers of the United States.

After discussing the limited powers granted by the Constitution, he said: [77]

My position is that the clause in question was intended and operates for the purpose of designating the extent of the power of impeachment, both as to the offenses and the persons liable to be thus proceeded against. It will be of use here to recollect that the Constitution had previously provided for the purity of the legislature in the second clause of the fifth section of the first article by empowering each House to punish its Members for disorderly behavior, and, with the concurrence of two-thirds, to expel a Member. No clause similar to that which is introduced into some of the State constitutions (that a member expelled and then returned is not liable to be expelled again for the same offense) is to be met with in the Constitution of the United States; and therefore the Senate has an unlimited power to expel any Member they shall deem unworthy their society.

Here, then, I flatter myself, the dispute admits of a clear solution—is reduced within a narrow compass, and brought to a point.

It is a rule of construction that every part of an instrument be, if possible, made to take effect and every word operate in some shape or other.

There are but two constructions suggested as possible—the one for which the honorable managers contend, to wit: That the fourth section of the second article was intended as an imperative injunction upon the Senate that when judgment was rendered against a civil officer of the United States it should be for removal from office; the other, that for which we, as counsel for the defendant, insist—that is, that it was intended to designate the extent of the practice of proceeding by impeachment, specifying who are the persons to be proceeded against, and for what offenses. If, then, I am able to show that the words of the fourth section of the second article will not have any effect or operation at all, unless they receive the construction for which I contend; if I establish these premises, the inference will necessarily follow that the construction for which the honorable managers contend is not well founded, and that the construction for which we contend is the true meaning of the Constitution in this particular. To this fair, short, and decisive test be the appeal.

He then proceeded to give emphasis to the word "further" in the Constitution, and to show that disqualification of office necessarily implied removal: [78]

It is impossible to pronounce a judgment that a man shall be incapable of holding an office and not remove him. The incapacity takes effect immediately. It is coeval with the judgment. There is not any interval between the judgment pronounced and the disqualification and incapacity. It is of course ridiculous to say that the fourth section of the second article was introduced to make it imperative upon the Senate to remove from office on conviction, when it was previously made so imperative that it was impossible to avoid pronouncing a judgment that would operate a removal from office. As it is thus clear beyond the possibility of doubt that the fourth section of the second article was not introduced for the purpose suggested by the honorable managers, which I have considered, and as no third construction has been attempted on either side, I infer that the construction contended for by the counsel for the defendant is well founded, to wit: That the fourth section of the second article was intended for the purpose of designating the extent of the power of proceeding my impeachment, at least so far as respects the persons liable to be thus proceeded against.

Further, if anything further be necessary upon a matter so very plain, if, as the honorable managers insist, all persons are within the extent of this mode of proceeding, why make it imperative on the Senate to remove civil officers only? Why make it absolutely imperative to remove the marshal of a district, whose sphere of influence is comparatively inconsiderable, and leave a general at the head of an army or an admiral in the command of a navy? Would not the public security be much more endangered by leaving a man convicted of high crimes and misdemeanors in these situations than those of many civil offices? It may

[77] Annals, p. 2283.
[78] Annals, p. 2286.

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be said that these military characters are liable to be proceeded against by courts-martial. Be it so; that consideration is a good reason why they should not be considered as within the power of impeachment, as we assert to be the case; but none at all for not removing them on conviction, if they are within the provision of the Constitution in this particular. And if Senators were within the power of proceeding by impeachment, would it not also have been made imperative upon the Senate to remove them, or have a veto upon every bill proposed to be passed into a law and every nomination for appointment to office?

I add, that I conceive the proceedings by impeachment are restricted not only to civil officers, but that the only causes cognizable in this mode of proceeding are malconduct in office.

Proceeding to consider whether or not Senators are "civil officers of the United States," after quoting Blackstone's definition, "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging," Mr. Ingersoll called attention to the fact that an officer excluded from his office might obtain admission by mandamus proceedings. Might a Senator avail himself of these remedies? This question he answered in the negative.

To be an officer of the Government one must receive a commission from the Executive. A Senator was not such an officer. Nor was there force in the argument that a Senator had a judicial as well as an executive character. All those qualities of his position emanated from the same source as his legislative qualities.

He said on another point: [79]

Senators and Members of the House of Representatives have one set of words appropriated to them in the Constitution—civil officers, other terms; as thus, "office," "appointment," "commission," "removal;" Senator, or one of the House of Representatives. "Member," "election," "expulsion," "seat vacated."

What interpretation shall we give to the sixth section of the fourth article? "No person holding any office under the United States shall be a Member of either House during his continuance in office;" and yet a Senator is, ipso facto, it is said, an officer of the United States. Identity is incompatibility. The exception of a Senator is implied, say the honorable managers; but how do they show it? Is not this section to be understood as importing that the character of a Member of either House and that of an officer of the United States are, by the Constitution, distinct and incompatible? The distinction is observed throughout. Can the Clerk of this House, or the Clerk of the other House, be proceeded against by impeachment? I conceive not; because they are not appointed nor commissioned by the United States Government, or by the Executive thereof, but by the respective Houses. I believe that not an instance can be found in the Constitution of the United States in which a Senator is classed under the denomination of an officer, or civil officer of the United States.

Some observation was made on the ninth section of the first article of the Constitution of the United States, "that no person holding any office of profit or trust under the United States should, without the consent of Congress, accept of any present from any king, prince, or foreign state." Might a Senator, one in so important a public situation, accept of a present from a foreign state? No, I answer. The power of expulsion is a sufficient check. The impropriety of the measure would be a sufficient guard. The laws, in consonance with the Constitution of the United States, distinguish between the Members of the legislature and the officers of the United States, and also of the several States.

In the first volume of the laws of the United States, page 18, section 3, it is provided "that all members of the State legislatures, and the executive and judicial officers of the several States, shall take an oath to support the Constitution;" and by section 2 it is provided "that the Members of the Senate and House of Representatives," and by section 4, "that all officers of the United States" shall take the same oath, distinguishing between the Members of either House and the officers of the United States. In the constitution of the State of Pennsylvania, of New York, of Massachusetts, and of New Hampshire the same distinction of language is observed. The distinction is equally familiar in the English law. In

[79] Annals, p. 2291.

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the first volume of Blackstone's Commentaries, page 368, it is said "that the oath of allegiance must be taken by all persons in any office, trust, or employment;" yet members of either House are not considered as included. On page 374 of the same volume it is declared "that no denizen can be of the Privy Council, or either House of Parliament, or have any office of trust, civil or military." Such, I believe, has been the universal understanding of the expressions until the present prosecution.

It is a rule of construction that when a law is only doubtful, arguments ab inconvenienti are most powerful. The rule will apply, with equal propriety, to the construction of a constitution. If the most numerous branch, already, I repeat it, sufficiently formidable, may proceed by impeachment against a Senator—at their will doom to temporary disgrace any Member—this would form an engine of immense additional weight in their hands. I know that it is not always an objection against intrusting power that it may be abused; but when it is unnecessary to make the trust, and the danger great, the risk ought not to be incurred.

In concluding for the managers, Mr. Harper joined issue [80] with Mr. Ingersoll as to the intent of the clause relating to impeachments:

But admitting, Mr. President, that the power of impeachment is restricted by the Constitution to officers of the Government of the Unied States, still I contend that a Senator of the United States, a Member of this honorable body, is an officer of the Government, in the constitutional meaning of the word, and consequently liable to impeachment on the doctrine of the learned counsel themselves.

The learned counsel have, indeed, contended by their plea and in their arguments that none but civil officers are liable to impeachment by the Constitution; but in this they are plainly contradicted by the Constitution itself. They found their argument on that clause which provides "that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." But this clause is, evidently, not restrictive, but imperative. It does not point out what persons or what officers shall be liable to impeachment, but expressly orders that such and such officers, when convicted on impeachment, shall be punished to the extent, at least, of removal from office. The former clause had declared that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the United States," leaving the Senate to apportion the punishment, according to its discretion, within those limits. They might censure the person convicted, suspend him for a limited time, or disqualify him perpetually for certain offices, or for all offices during a certain period. But beyond absolute removal and perpetual disqualification for all offices they could not go. This was fixed as the utmost limit of their power and of their discretion.

It was judged, however, that in case of the President, Vice-President, or any civil officer the punishment ought not to be less than removal, though it might be more, according to circumstances. This provision was, therefore, inserted. Its object, manifestly, is, not to designate the persons who shall be liable to impeachment, but to prevent the Senate, in the exercise of their discretion, from retaining in a civil office a person convicted of "treason, bribery, or other high crimes and misdemeanors." As to the distinction here made between civil officers and other officers, there is no need to examine or defend it. It may, however, be supposed to have arisen from an opinion, certainly well founded, that, under certain circumstances, there might be danger or great inconvenience in removing from his command a military officer, whom, nevertheless, it might be very proper to censure or suspend, or even to disqualify for some particular offices. As to military officers, therefore, a complete discretion was left to the Senate; but not in the case of civil officers, to whom the same reasons could not apply. They, on conviction, must be removed. Military officers may be removed or not, according to circumstances.

He further contended that a Senator was an officer in the sense of the Constitution, and after exhaustively considering the definitions of the term "office," he said: [81]

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[80] Annals, p. 2302.
[81] Annals, p. 2307.

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The manner in which the term "office" is used by legal writers, and their formal definitions of it, support the interpretation which I have drawn from its received and common acceptation. Without going into a detail on this point, which might be tedious, let it suffice, Mr. President, to refer to Blackstone, who has been justly relied on by the learned counsel for the defendant, as a standard authority on subjects of this kind. Speaking of "offices," in the second volume of his Commentaries, page 36, as cited by the learned counsel who preceded me, that great writer lays it down that "offices are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging." Now, let me ask, is not a seat in this honorable body "a public employment?" Has not the Member "a right to exercise this employment, and to receive the emoluments thereunto belonging?" Surely to answer in the negative would be a strange abuse of language.

The learned counsel who immediately preceded me has contended that a Senator can not be considered as an "officer," because there could be no quo warranto to remove him from his place if he held it improperly, nor mandamus to place him in it if unjustly kept out. But surely this can not be a well-founded argument, for, if it be, it applies as well to the President, the Judges, the Secretaries, and the Commander in Chief of the Army as to a Senator. Not one of them could be removed by quo warranto or replaced by mandamus. Did anyone ever hear of a quo warranto to remove a colonel of a regiment? Was a quo warranto ever brought in England against the Chancellor of the Exchequer or a Secretary of State, or a Lord of the Admiralty? Certainly not, and yet that these are officers will not be denied. The truth is, Mr. President, that the doctrine of quo warranto and mandamus, as far as it relates to officers, is confined exclusively to certain local municipal officers of a subordinate nature, who are placed, by the common law of England, under the superintendence of the supreme court of justice; to which, from the nature of their offices, recourse could most conveniently and effectually be had for their punishment, their removal, or their reinstatement. But this reason did not extend to the great officers of the State, of the Army, or the Navy, or to any of their subordinates. They could best be punished, removed, and replaced in a different manner and by a different authority. To them, therefore, nobody ever dreamt of extending the power of the supreme courts by quo warranto and mandamus, and yet nobody ever, on this account, thought of denying that they were "officers," which, however, would be just as reasonable as to contend that a Senator of the United States is not an "officer," because he can not be removed by a quo warranto or admitted by mandamus. I admit that it would be absurd to talk of an office from which a man could not be removed, however flagitious his conduct; or into which, when entitled to it, and improperly kept out, he had no means of obtaining admission. But a Senator may be removed by a vote of expulsion, and if duly elected, but not returned, may obtain his seat by a petition to the Senate.

I conceive, therefore, that no argument can be more destitute of foundation than that which would divest a seat in this honorable body of the quality of an "office," because it is not within the scope of write of mandamus and quo warranto.

If from Blackstone, Mr. President, we turn to our own laws, our own writers, and even our own constitutions, we shall equally find that a seat in the legislature is considered as an "office."

After discussing the legislator as an officer, especially in the light of the State and national constitutions and laws, especially discussing one clause of the National Constitution—[82]

A clause from the sixth section of the first article, in the following words, has also been relied on:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a Member of either House during his continuance in office."

I am ready to admit, Mr. President, with my honorable colleague, who opened the case, that this clause wears an aspect more hostile to our construction of the term "office" than any other part of the Constitution, but I contend with him that the Constitution, like all other instruments, must be construed in each

[82] Annals, p. 2312.

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separate part of it, secundum subjectam materiem, according to the subject-matter of each part, and in such a manner as to effectuate every part and render the whole consistent. These rules of construction will not be denied. When this clause comes to be analyzed and tried by these rules, it will, I think, appear satisfactorily that our construction is not infringed by it.

What is the object of this clause? It is threefold: First, to prevent a blending of the different departments of Government—the legislative, executive, and judicial—by uniting their functions in the hands of the same individual, which would be contrary to the spirit of the Constitution; secondly, to prevent the executive from acquiring an undue influence in the legislature, by appointing its most active and able Members to offices which must be held at his pleasure, and, thirdly, to take away from aspiring or avaricious Members the temptation to create offices or increase their emoluments, which might arise from the expectation of speedily filling those offices themselves. What description of officers was it necessary to exclude from the legislature in order to effect these three objects? First, those whose duties might be incompatible with a strict and regular attendance in the legislature; secondly, those who derive their appointments from the Executive, and, thirdly, those whose offices are of a nature to be considered as lucrative—to be sought after on account of their pecuniary emoluments. It is evident that some one or other of these characteristics belongs to every description of officers, except "legislative"—to military, to executive, judicial, and diplomatic. It is to be presumed that the Constitution here used the word "office" in that sense, and that only, which was necessary in order to effectuate its intentions, and consequently that the clause extends to those officers only whom it was the intention of the Constitution to exclude from the legislature. The clause therefore is to be understood as if, instead of the general expressions, "any civil office," "any office," it had said, "any other civil office," "any other office." This will render the whole Constitution consistent with itself and with the well-established meaning of language. In the clause relative to commissions we have an instance where, in order to prevent the Constitution from pronouncing a palpable absurdity, it was necessary to explain the general term "all officers," so as to mean "all officers appointed by the President." If the general expression may be controlled by the subject-matter and intent in one case, it may in another, and certainly the subject-matter and intent could not speak more strongly against the general expression in the former, or in any other case, than in this.

If this reasoning be well founded, it follows that the clause in question proves nothing against our doctrine of a Senator being an officer in the sense of the Constitution. It only proves that the Constitution, being obliged to use the same word in application to different matters, and for different purposes, has used it generally and left it to be explained by a reference to the intent and subject-matter, instead of explaining it by express modifications. The object here was to exclude certain officers from the legislature, and the term is used generally; but it by no means follows, from thence, that Members of the legislature are not themselves officers.

Also another argument was answered:[83]

An objection has also been drawn from the supposed intention with which the power of impeachment was established by the Constitution. The sole object of this power, it is said, was to provide a remedy against the favoritism or obstinacy of the Supreme Executive Magistrate, by affording a means of removing from office improper persons, whom he might be inclined to retain in place to the detriment of the nation. This necessity does not exist, we are told, with respect to members of the legislature who are removable by the people themselves at stated periods, and to whom, consequently, the power of impeachment ought not to extend.

But this can not be the sole object of the power of impeachment, because the President himself is liable to be impeached, as well as the officers whom he appoints. So also is the Vice-President. And yet these two great officers are appointed by the people themselves, in a manner far more direct and immediate than Senators and removable at shorter periods. If the power of impeachment be, as the learned counsel insist, intended as an aid to the control which the people, by the right of election, have over their public servants, or to supply the place of that control where it does not exist, surely there is much stronger reason for its extending to Senators than to the President or Vice-President, for

[83] Annals, p. 2315.

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Senators are much farther removed from the power of the people and the control of elections than those officers. They are elected for a much longer period; their election being made by legislative bodies, who are chosen by the people for other purposes and, for a considerable time, is far less influenced by popular opinion or popular feelings than that of the President, who is chosen by electors elected for that sole purpose, and selected, in almost every instance, according to their known attachment to the favored candidate. The election of the President and Vice-President therefore partakes far more of the nature of a popular election than that of Senators. Indeed, of all the component members of our Government the Senate, both in the mode of its appointment and the term of its duration, is intended to be, and actually is, the most permanent and independent—the furthest elevated above the region and the influence of those storms whereby a popular government must sometimes be agitated. God forbid, Mr. President, that I should find fault with these ingredients in the composition of the Senate or do anything which could tend in the least to diminish their efficiency. I consider them as among the most valuable principles of the Constitution.

And finally he urged: [84]

But the effect of an impeachment, it is said, may be produced in another manner, more conformable to the dignity of the Senate. The same majority of two-thirds which can convict on an impeachment may also expel, and thus an improper person may be driven from the Senate. But, in the first place, he can not be thus kept out in future; for, though the Senate may expel, it can not disqualify. And if we suppose the case (which may very well happen) of a great and wicked man, supported by a strong party in the legislature of his own State, he may return again, after being expelled and may go on in the commission of "high crimes and misdemeanors," in the very station which gives him the greatest means of committing them with effect.

In the second place, an offender has a much better chance to escape from an expulsion than from an impeachment. Where the offense is of a very dark and complicated nature, consists in transactions or plots carried on at a distance or in many places at once, and of consequence can not be brought to light and fully substantiated without a laborious, long-continued and systematic inquiry, it must be admitted that the aid of a prosecutor will be necessary, and that the Senate of itself and for the mere purpose of expulsion will be little disposed to undertake so tedious and disagreeable a task.

2317. Blount's impeachment, continued.

In the Blount case it was conceded that a person impeached might not avoid punishment by resignation.

(5) As to the status of Mr. Blount at the time of the argument, Mr. Bayard said: [85]

It is also alleged in the plea that the party impeached is not now a Senator. It is enough that he was a Senator at the time the articles were preferred. If the impeachment were regular and maintainable when preferred, I apprehend no subsequent event, grounded on the willful act, or caused by the delinquency of the party, can vitiate or obstruct the proceeding. Otherwise the party, by resignation or the commission of some offense which merited and occasioned his expulsion, might secure his impunity. This is against one of the sagest maxims of the law, which does not allow a man to derive a benefit from his own wrong.

Speaking for the respondent, Mr. Dallas said: [86]

It is among the less objections of the cause that the defendant is now out of office, not by resignation. I certainly shall never contend that an officer may first commit an offense and afterwards avoid punishment by resigning his office; but the defendant has been expelled. Can he be removed at one trial and disqualified at another for the same offense? Is it not the form rather than the substance of a trial? Do the Senate come, as Lord Mansfield says a jury ought, like blank paper, without a previous impression upon their minds? Would not error in the first sentence naturally be productive of error in the second instance? Is there not reason to apprehend the strong bias of a former decision would be apt to prevent the influence of any new lights brought forward upon a second trial?

[84] Annals, p. 2317.
[85] Annals, p. 2261.
[86] Annals, p. 2293.

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23.18. Blount's impeachment, continued.

The Senate decided that it had no jurisdiction to try an impeachment against William Blount, a Senator.

The Senate notified the House that it had made a decision in the Blount case and set a time for receiving the managers and rendering judgment.

The House did not attend its managers during the Blount impeachment, even at the judgment.

Form of judgment pronounced by the Vice-President in the Blount impeachment.

Judgment being given in the Blount impeachment, the managers submitted to the House a report in writing.

The Senate delivered to the managers for transmission to the House an attested copy of its judgment in the Blount case.

On January 7 [87] the Senate resolved itself into a court of impeachment, and the following resolution was offered:

That William Blount was a civil officer of the United States within the meaning of the Constitution of the United States, and therefore liable to be impeached by the House of Representatives;

That as the articles of impeachment charge him with high crimes and misdemeanors, supposed to have been committed while he was a Senator of the United States, his plea ought to be overruled.

This resolution was debated in the court of impeachment until January 10,[88] when it was disagreed to, yeas 11, nays 14.

On January 11,[89] it was determined by a vote of 14 yeas and 11 nays, the division of Members being exactly as on the preceding day:

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

It was further ordered by the court of impeachment:

Ordered, That the Secretary notify the House of Representatives that the Senate will be ready to receive the manners of the House of Representatives and the counsel of the defendant on Monday next, at 12 o'clock, to render judgment on the impeachment against William Blount.

The Journal of the Senate has no record of this order; but it was received in the House the same day as a message from the Senate.[90]

On January 14,[91] the managers alone attended, the House going on with the transaction of its business. The court being opened and silence being proclaimed, the parties attending, judgment was pronounced by the Vice-President as follows:

Gentlemen, managers of the House of Representatives, and gentlemen, counsel for William Blount: The court, after having given the most mature and serious consideration to the question, and to the full and able arguments urged on both sides, has come to the decision which I am now about to deliver.

The court is of opinion that the matter alleged in the plea of the defendant is sufficient in law to show that this court ought not to hold jurisdiction of the said impeachment, and that the said impeachment is dismissed.

Copies of the judgment were delivered to the managers and to the counsel for the defendant, respectively.

After which they withdrew; and, on motion, the court adjourned without day.

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[87] Senate Journal, p. 568; Annals, p. 2318.
[88] Annals, p. 2318.
[89] Annals, p. 2319.
[90] House Journal, p. 430.
[91] House Journal, pp. 431, 432; Annals, pp. 2648, 2319.

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On the same day, in the House,[92] Mr. Bayard, from the managers appointed on the part of this House to conduct the impeachment against William Blount, made a further report, which was read, as follows:

That agreeably to the notification of the Senate they attended at their bar to hear their judgment upon the plea of the said William Blount, and that the President of the Senate pronounced judgment upon the said plea, a copy whereof was ordered to be delivered to the managers and is annexed to this report.

"UNITED STATES OF AMERICA, FRIDAY, JANUARY 11, 1799. HIGH COURT OF IMPEACHMENT.

"UNITED STATES *v.* WILLIAM BLOUNT.

"The court is of opinion, etc. [Here follows the decision as given above.]
"Attest:

"SAM A. OTIS, *Secretary*."

The report and copy were ordered to lie on the table.

[92] House Journal, pp. 431, 432.

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The Impeachment and Trial of John Pickering*

1. Preliminary inquiry and action by House. Section 2319.
2. Presentation of impeachment at bar of Senate. Section 2320.
3. The articles and their presentation. Sections 2321–2328.
4. The summons and return. Sections 2329–2330.
5. Rules and organization of Senate. Section 2331.
6. The calling of respondent and presentation of his petition. Sections 2332, 2333.
7. Hearing on a preliminary question. Section 2334.
8. Presentation of testimony. Sections 2335–2336.
9. Judgment pronounced. Sections 2337–2341.

2319. The impeachment and trial of John Pickering, judge of the United States district court for New Hampshire, in 1803.

The impeachment proceedings against Judge Pickering were set in motion by a message from the President.

The committee recommended and the House voted the impeachment of Judge Pickering on the strength of certain ex parte affidavits.

The House decided to proceed in the Pickering impeachment, although the session and the Congress neared an end.

The Pickering impeachment was carried to the Senate by a committee of two.

Forms of resolutions for impeachment of Judge Pickering and directing the carrying of the same to the Senate.

On February 4, 1803,[1] a message was received from the President of the United States transmitting a "letter and affidavits exhibiting matter of complaint against John Pickering, district judge of New Hampshire, which is not within executive cognizance."

The message was read, and with the accompanying papers, was referred to a committee composed of Messrs. Joseph H. Nicholson, of Maryland; James A. Bayard, of Delaware; John Randolph, jr., of Virginia; Samuel Tenney, of New Hampshire; and Lucas Elmendorf, of New York.

Accompanying the message were the following documents: (1) A letter from Albert Gallatin, Secretary of the Treasury, to the President, stating that it appeared that Judge Pickering, in a suit wherein the revenue was concerned, had "acted in a manner which showed a total unfitness for the office," and which showed "some legislative interference absolutely necessary;" (2) a letter from John S. Sherburne, United States district attorney for New Hampshire, to the Secretary of the Treasury, transmitting affidavits and making a statement as to the conduct of the judge; (3) affidavits of Thomas

* Hinds Precedents, Vol. 3, p. 681 (1907).
[1] Second session Seventh Congress, Journal, p. 322; Annals, p. 460.

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Chadbourne, Jonathan Steele, Daniel Humphrey, John Wentworth, Joseph Whipple, and R. C. Shannon setting forth specific acts of said judge. These affidavits were taken ex parte.[2]

On February 18[3] Mr. Nicholson submitted the report of the committee:

That from the face of the said depositions it appears that the said John Pickering has been guilty of high misdemeanor in the exercise of his judicial functions, and recommend the adoption of the following resolution:

"*Resolved*, That John Pickering, judge of the district court of the district of New Hampshire, be impeached of high crimes and misdemeanors."

On March 2[4] the report was considered by the Committee of the Whole, who recommended concurrence in the report, after a debate which is very briefly reported and during which the principal question seems to have been the advisability of proceeding in the case at so late a period in the session. A proposition to postpone the resolution to the next session was disagreed to, ayes 9, noes 43.

The House agreed to the resolution, yeas 45, nays 8.

Thereupon it was

Ordered, That Mr. Nicholson and Mr. Randolph be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

2320. Pickering's impeachment, continued.

Ceremonies of presenting the Pickering impeachment at the bar of the Senate.

Form of declaration by House committee in presenting the impeachment of Judge Pickering in the Senate.

Verbal report made by the House committee on returning from presenting in the Senate the impeachment of Judge Pickering.

Proceedings and resolutions adopted by the Senate in taking order on the presentation of the Pickering impeachment.

The impeachment of Judge Pickering was presented in the Senate on the last day of the Seventh Congress.

On March 3,[5] in the Senate, a message was received from the House of Representatives by Mr. Nicholson and Mr. Randolph, as follows:

Mr. President, we are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.

We are further commanded to demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

Then they withdrew.

On the same day in the House,[6] Mr. Nicholson reported verbally:

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[2] These documents were published with the report of the committee. Copies are rare, but may be found in the Library of Congress.

[3] Second session Seventh Congress, House Report, p. 252; Journal, p. 351; Annals, p. 544.

[4] Journal of House, pp. 383, 384; Annals, p. 642.

[5] Senate Journal, p. 284; Annals, p. 267.

[6] House Journal, p. 387.

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That, in obedience to the order of the House, the committee had been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, had impeached John Pickering, judge of the district court of the district of New Hampshire, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And, further, that the committee had demanded that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.

On the same day, in the Senate,[7]

Ordered, That the message received this day from the House of Representatives respecting the impeachment of John Pickering, judge of a district court, be referred to Messrs. Tracy [Uriah, of Connecticut], Clinton [De Witt, of New York], and Nicholas [Wilson C., of Virginia].

Later on this day Mr. Tracy reported from the committee the following resolution and preamble, which were agreed to by the Senate:

Whereas the House of Representatives have this day, by two of their Members, Messrs. Nicholson and Randolph, at the bar of the Senate, impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same,

And have likewise demanded that the Senate take order for the appearance of the said John Pickering to answer to the said Impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given the House of Representatives.

Resolved, That the Secretary of the Senate notify the House of Representatives of this resolution.

On the same day a message announcing this resolution was received in the House.[8]

And late on the same day, March 3, 1803, both House and Senate adjourned sine die, the term of the Seventh Congress having expired.

2321. Pickering's impeachment, continued.

At the beginning of the Eighth Congress the House continued the Pickering impeachment by appointing a committee to prepare articles.

The Eighth Congress met in its first session on October 17, 1803, it being the day appointed by law. The proceedings against Judge Pickering were continued from the point where they had been interrupted by the expiration of the Seventh Congress.

On October 20,[9] in the House, Mr. Nicholson stated that during the last session the House had voted an impeachment against John Pickering, judge of the district court for New Hampshire, for high crimes and misdemeanors. But the impeachment had been voted at so late a period of the session as rendered it impossible to act then finally upon it. In order that it might be now acted upon, and the impeachment proceed, he moved the adoption of the following:

Resolved, That a committee be appointed to prepare and report articles of impeachment against John Pickering, district judge of the district of New Hampshire, who was impeached by this House during the last session of high crimes and misdemeanors: and that the said committee have power to send for persons, papers, and records.

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[7] Senate Journal, p. 285; Annals, p. 268.
[8] House Journal, p. 392.
[9] First session Eighth Congress, House Journal, p. 411; Annals, p. 380.

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The committee were appointed as follows: Messrs. Nicholson, John Randolph, jr., Roger Griswold, of Connecticut; Peter Early, of Georgia, and Samuel Thatcher, of Massachusetts.

2322. Pickering's impeachment, continued.

The Senate declined to order compulsory process to compel the appearance of Judge Pickering, but authorized a committee to examine the subject.

On October 27,[10] in the Senate, the following resolution was proposed, but was laid on the table:

Resolved, That a committee be appointed to prepare the process to compel the attendance of John Pickering to answer the charge exhibited against him by the House of Representatives at their last session.

On November 14 [11] the Senate resumed consideration above given and, having amended it, agreed to it as follows:

Resolved, That a committee be appointed to inquire if any, and what, further proceedings at present ought to be had by the Senate respecting the impeachment of John Pickering, made at the bar of this Senate by two Members of the House of Representatives on the last day of the last session of Congress.

The following committee were appointed: Uriah Tracy, of Connecticut; Stephen R. Bradley, of Vermont; Abraham Baldwin, of Georgia; Robert Wright, of Maryland, and William Cocke, of Tennessee.

2323. Pickering's impeachment, continued.

The House considered the articles of impeachment of Judge Pickering in Committee of the Whole House.

The articles of impeachment of Judge Pickering were enrolled after they were agreed to by the House.

In the Pickering impeachment the House decided that the managrs should not be appointed by the Speaker or by viva voce vote, but by ballot.

The House having excused a Member elected manager in the Pickering case, another was chosen by ballot.

Form of resolution directing the carrying of the articles of impeachment of Judge Pickering to the Senate.

Form of resolution directing that the Senate be informed of the appointment of managers and that they will carry articles to the Senate.

It does not appear that the message announcing the appointment of managers of the Pickering impeachment included their names.

On December 27 [12] Mr. Nicholson, from the committee appointed to prepare articles of impeachment, presented them to the House; and having been read, the same were referred to a Committee of the Whole House.

On December 30 [13] the articles were considered in Committee of the Whole and being reported therefrom without amendment, were agreed to by the House. They appear in full in the Journal. During the proceedings [14] on the articles Mr. Samuel Tenney, of New Hampshire,

[10] Senate Journal, p. 303; Annals, p. 27.
[11] Senate Journal, p. 310; Annals, p. 75.
[12] House Journal, p. 503.
[13] House Journal, p. 507.
[14] Annals, pp. 794, 795.

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called for the reading of several depositions to show that Judge Pickering had sustained a respectable character and that his recent conduct had arisen from insanity. In reply Mr. Nicholson said that the House had determined that they would impeach, and it was therefore the present duty to furnish the Senate with the articles. Mr. Nicholson further said that he was informed from respectable sources that Judge Pickering was habitually intoxicated. The articles were agreed to without division.

On motion of Mr. Nicholson, according to the Annals [15] the articles were ordered to be enrolled, in correspondence with the practice of the House. The Journal does not mention this.

It was then ordered that eleven managers be appointed on the part of the House. A discussion arose as to the manner of selection. A motion that they be appointed by the Speaker was decided in the negative. Then it was decided that they be appointed by ballot, although several Members, notably Mr. Nicholson, urged that they should be elected by viva voce vote.

It does not appear that a special rule was made to govern the balloting, which was presumably conducted under the then existing rule of the House.

The following were chosen managers: Messrs. Nicholson, Early, Cæsar A. Rodney, of Delaware; William Eustis, of Massachusetts; John Randolph, jr., of Virginia; Roger Griswold, of Connecticut; Samuel L. Mitchell, of New York; George W. Campbell, of Tennessee; William Blackledge, of North Carolina; John Boyle, of Kentucky, and Joseph Clay, of Pennsylvania.

On motion,

Ordered, That Mr. Roger Griswold be excused from serving as one of the managers appointed to conduct the said impeachment; and that the House do now proceed, by ballot, to the appointment of another manager to serve in his stead.

Thereupon Mr. Thomas Newton, jr., of Virginia, was chosen.

On January 3, 1804,[16] it was

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves, and of all the people of the United States, against John Pickering, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate, to inform them that this House have appointed managers, on their part, to conduct the impeachment against John Pickering, and have directed the said managers to carry to the Senate the articles agreed upon by the House, to be exhibited in maintenance of their impeachment against the said John Pickering; and that the Clerk of this House do go with the said message.

On the same day in the senate:[17]

A message from the House of Representatives informed the Senate that the House have appointed managers, on their part, to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, and have also directed the said managers to carry to the Senate the articles agreed upon by the House of Representatives to be exhibited against the said John Pickering.

It does not appear that the message announced the names of the managers.

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[15] Annals, p. 795.
[16] House Journal, pp. 511, 512; Annals, p. 797.
[17] Senate Journal, p. 332.

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2324. Pickering's impeachment, continued.

The Senate decided, in the Pickering case, that it would take order for respondent's appearance only after articles had been exhibited.

The Senate committee concluded, in the Pickering case, that there was no impeachment before the Senate until articles were exhibited.

It was concluded by a Senate committee in Pickering impeachment that the Senate had no power to take into custody the body of the accused.

A notification to the accused with a copy of the articles was deemed, in the Pickering impeachment, all the process necessary.

A Senate committee concluded, in the Pickering impeachment, that respondent might answer in person, by attorney, or not at all.

In the Pickering case the Senate committee concluded that after service of notice of the articles, the Senate might proceed to trial whether respondent entered appearance or not.

The Senate committee advised, in Pickering's case, that the Senate had the sole power to regulate forms, substances, and proceedings when acting as a court of impeachment.

On the same day in the Senate, after the receipt of the above message a report submitted by Mr. Tracy, from the committee appointed to inquire as to further proceedings, was submitted as follows: [18]

That they find the following facts, which have an immediate relation to the subject committed to them, viz: "On the last day of the last session of Congress two Members of the House of Representatives came to the Senate, and in the name of the House, and of all the people of the United States, verbally impeached John Pickering, district judge of the district of New Hampshire, of high crimes and misdemeanors, without any specification; and likewise, they verbally acquainted the Senate that the said House of Representatives would in due time exhibit particular articles of impeachment against him, the said Pickering, and make good the same. And they verbally demanded that the Senate should take order for the appearance of the said John Pickering, to answer to the said impeachments;" and that said verbal declaration of impeachment was committed by the Senate to a select committee, who reported thereon, in the following words, viz: "*Resolved*, That the Senate will take the proper order thereon (that is, of the verbal impeachment aforesaid), of which due notice shall be given to the House of Representatives," of which resolution, the Secretary of the Senate gave information to the House of Representatives.

With these facts in view, your committee have attended to the constitutional powers vested in the Senate as a court of impeachment, and they find that "judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States;" and that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." Hence your committee suppose that no power is constitutionally vested in the Senate to take into custody, or hold the body of the person impeached for trial; but that a notification to the party of the impeachment, with a copy of the articles exhibited, is all the process requisite in the case; and that it is optional with the party to appear in propria persona, by attorney, or not at all; and that after the notice given as aforesaid, it is competent for the Senate to proceed to a trial and judgment on said impeachment, whether the party shall appear by himself, his attorney, or not at all. And although your committee would not in the smallest degree interfere with the House of Representatives, in the manner of instituting the process of impeachment, since the sole right of impeaching is vested in the Constitution in that House, yet they believe the

[18] Senate Journal, p. 332; Annals, p. 224.

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Senate, in common with other courts, have the sole power, while acting as a court of impeachment, to regulate all forms as well as substance of impeachments which shall be presented to them, and all proceedings to be had thereon. They therefore are of opinion that at present no further proceeding ought to be had by the Senate respecting the verbal impeachment of John Pickering, made at the bar of the Senate by two Members of the House of Representatives, on the last day of the last session of Congress; and that in strict and proper construction there is no impeachment before the Senate, until exhibited to them by the House of Representatives, in written articles.

On a full view of the subject, the committee respectfully submit for the consideration and adoption of the Senate the following resolution, viz:

"*Resolved*, That the Senate can not with propriety take any order upon the verbal notification to them by the House of Representatives, on the last day of the last session of Congress, that they did impeach John Pickering of high crimes and misdemeanors. And that all proceedings thereon by the Senate must be deferred until written articles shall, in due form, be presented by said House of Representatives."

It does not appear that the above resolution was formally agreed to by the Senate.

2325. Pickering's impeachment, continued.

Rule of the Senate prescribing forms and ceremonies for receiving managers in presenting articles of impeachment against Judge Pickering.

The Senate organized as a court before receiving the articles in the Pickering case.

The oath administered by the Secretary to the President and by him to the Senators in the Pickering impeachment.

The Senate set a day and hour for receiving the managers to exhibit articles impeaching Judge Pickering, and informed the House thereof.

The Senate appointed a committee to search the Journals for precedents for the Pickering impeachment.

The same committee further reported the following resolution:

Resolved, That, at 12 o'clock to-morrow, the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and, by him, to each member of the Senate, viz: "I, ——, solemnly swear (or affirm, as the case may be), that, in all things appertaining to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, I will do impartial justice, according to law," which court of impeachments, being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court for the district of New Hampshire, pursuant to notice given to the Senate this day by the House of Representatives, that they had appointed managers for the purposes aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

It was further—

Ordered, That a committee be appointed to search the Journals and report precedents in cases of impeachments; and that Messrs. Tracy, Bradley, Baldwin, Wright, and Cocke, to whom it was referred on the 14th of November last, to consider and report, if any, what further proceedings ought to be had by the Senate, respecting the impeachment of John Pickering, by this committee.

On January 4,[19] in the House, the following message was received from the Senate:

[19] House Journal, p. 513.

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Mr. Speaker: I am directed to inform this House that the Senate will, at 12 o'clock this day, be ready to receive articles of impeachment against John Pickering, judge of the district court of United States for the district of New Hamphire, to be presented by the managers appointed by this House.

2326. Pickering's impeachment continued.

The Senate prescribed by rule the ceremonies for receiving the House managers to present articles of impeachment against Judge Pickering.

Form of proclamation made by the Sergeant-at-Arms, under direction of the President, when the managers presented articles in the Pickering impeachment.

Articles of impeachment being exhibited against Judge Pickering, the President of the Senate was directed by rule to state that order would be taken and the House would be notified.

On January 4,[20] in the Senate, before it resolve itself into a court of impeachment, Mr. Tracy, from the committee appointed to examine precedents, reported the following:

Resolved, That, after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against John Pickering, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation; who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States, sitting as a court of impeachment, articles of impeachment against John Pickering, judge of the district court for the district of New Hampshire."

After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

The resolution was agreed to.

2327. Pickering's impeachment continued.

In the Pickering trial a Senator, who as a Member of the House had voted for impeachment, was challenged, but voted.

Thereupon Mr. John Quincy Adams, of Massachusetts, offered the following:

Resolved, That any Senator of the United States, having previously acted and voted as a Member of the House of Representatives, on a question of impeachment, is thereby disqualified to sit and act, in the same case, as a member of the Senate, sitting as a court of impeachment.

It was agreed that this motion should lie for consideration.

An appendix to the records of the court of impeachment has the following:[21]

Early in the trial a question was raised as to the propriety of those gentlemen, viz, Samuel Smith, Israel Smith, and John Smith, of New York, who were during the last session Members of the House of Representatives, and voted here upon the question for impeaching Judge Pickering, sitting and voting as judges upon the trial.

Mr. Smith, of New York, wished to be excused.

Mr. S. Smith declared that he would not be influenced from his duty by any false delicacy; that he, for his part, felt no delicacy upon the subject, the vote he had given in the other House to impeach Judge Pickering would have no influence upon him in the court; his constituent had a right to his vote, and he would not by any act of his deprive or consent to deprive them of that right, but would claim

[20] Senate Journal, pp. 382, 383; Annals, p. 225.
[21] Annals, p. 368.

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and exercise it upon this as upon every other question that might be submitted to the Senate whilst he had the honor of a seat.

All these men appear as voting during the trial.

2328. Pickering's impeachment continued.

In the Pickering impeachment the Senate organized itself as a court before receiving the articles.

The Journal of the Pickering trial was kept separate from the regular Senate Journal.

Ceremonies of presenting the articles against Judge Pickering before the high court of impeachment.

In the Pickering impeachment the chairman of the managers read the articles and then delivered them at the table of the Senate.

The articles impeaching Judge Pickering, with signature of the Speaker and attestation of the Clerk.

The chairman of the managers reported verbally to the House after having presented in the Senate the articles impeaching Judge Pickering.

On this day, January 4 [22] the Senate resolved itself into a court of impeachment. The ordinary Senate Journal merely records this fact, but does not contain the record of the court's proceedings.[23]

On February 20, 1805,[24] the Senate resumed consideration of the motion for printing the Journals of their proceedings, while sitting for the purpose of trying impeachments, and agreed to it as follows:

Resolved, That the proceedings of the Senate while sitting for the purpose of trying impeachments shall be published in the same manner in which the legislative proceedings are now published, and this resolution shall have relation to all proceedings in trials of impeachments which have heretofore taken place.

The Senate having resolved itself into a court of impeachment, proceeded agreeably to its resolution to organize the court.[25]

The Secretary administered the following oath to the President:

You solemnly swear that, in all things appertainnig to the trial of the impeachment of John Pickering, judge of the district court of the district of New Hampshire, you will do impartial justice, according to law.

The President administered the oath, respectively, to Messrs. Adams, Armstrong, Anderson, Bailey, Baldwin, Bradley, Breckenridge, Brown, Cocke, Condit, Ellery, Franklin, Hillhouse, Jackson, Olcott, Pickering, Potter, Israel Smith, Samuel Smith, John Smith, Tracy, Venable, Wells, and Worthington; and the affirmation to Messrs. Logan, Maclay, and Plumer.

A message was received from the House of Representatives.

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

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[22] Senate Journal, p. 333.

[23] The Senate, however, kept in Journal form a record of "The trial of John Pickering, etc., on a charge exhibited to the Senate of the United States for high crimes and misdemeanors," which was published later. Senate Journal, Eighth Congress, pp. 493–507.

[24] Second session Eighth Congress, Annals, p. 63.

[25] Annals, p. 319.

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

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

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

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

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against John Pickering, judge of the district court of the district of New Hampshire, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

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

And whereas by an act of Congress, passed on the 2d day of March, in the year 1789, it is among other things provided that "upon the prayer of any claimant to the court that any ship or vessel, goods, wares, or merchandise so seized and prosecuted, or any part thereof, should be delivered to such claimant, it shall be lawful for the court to appoint three proper persons to appraise such ship or vessel, goods, wares, or merchandise, who shall be sworn in open court, for the faithful discharge of their duty; and such appraisement shall be made at the expense of the party on whose prayer it is granted; and on the turn of such appraisement, if the claimant shall, with one or more sureties to be approved of by the court, execute a bond in the usual form to the United States for the payment of a sum equal to the sum of which the ship or vessel, goods, wares, or merchandise so prayed to be delivered and appraised and moreover produce a certificate from the collector of the district wherein such trial is had and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the ship or vessel so claimed have been paid or secured in like manner as if the goods, wares, or merchandise, ship or vessel, had been legally entered, the court shall, by rule, order such ship or vessel, goods, wares, or merchandise, to be delivered to the said claimant;" yet the said John Pickering, judge of the said district court of the said district of New Hampshire, the said act of Congress not regarding, but with intent to evade the same, did order the said ship called the *Eliza*, with her furniture, tackle, and apparel, and the said two cables, to be delivered to a certain Eliphalet Ladd, who claimed the same, without his, the said Eliphalet Ladd, producing any certificate from the collector and naval officer of the said district that the tonnage duty on the said ship or the duties on the said cables had been paid or secured, contrary to his trust and duty as judge of the said district court, against the law of the United States and to the manifest injury of their revenue.

ART. 2. That whereas, at a special district court of the United States, begun and held at Portsmouth on the 11th day of November, in the year 1802, by John Pickering, judge of said court, the United States, by Joseph Whipple, the col-

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

ART. 3. That whereas it is provided by an act of Congress, passed on the 24th day of September, in the year 1789, "that from all final decrees of the district court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of $300 exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district;" and whereas on the 12th day of November, in the year 1802, at the trial of the aforesaid cause between the United States on the one part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, as forfeited for the cause aforesaid, and the said Eliphalet Ladd on the other part, claiming the said ship *Eliza*, with her furniture, tackle, and apparel, in his own proper right, the said John Pickering, judge of the said district of New Hampshire, did decree that the said ship *Eliza*, with her tackle, furniture, and apparel, should be restored to the said Eliphalet Ladd, the claimant; and whereas the said John S. Sherburne, attorney for the United States in and for the said district of New Hampshire, and prosecuting the said cause for and on the part of the United States, on the said 12th day of November, in the year 1802, did, in the name and behalf of the United States, claim an appeal from said decree of the district court to the next circuit court to be held in the said district of New Hampshire, and did pray the said district court to allow the said appeal, in conformity to the provisions of the act of Congress last aforesaid, yet the said John Pickering, judge of the said district court, disregarding the authority of the laws and wickedly meaning and intending to injure the revenues of the United States and thereby to impair their public credit, did absolutely and positively refuse to allow the said appeal, as prayed for and claimed by the said John S. Sherburne in behalf of the United States, contrary to his trust and duty of judge of the district court, against the laws of the United States, to the great injury of the public revenue, and in violation of the solemn oath which he had taken to administer equal and impartial justice.

ART. 4. That whereas for the due, faithful, and impartial administration of justice, temperance and sobriety are essential qualities in the character of a judge, yet the said John Pickering, being a man of loose morals and intemperate habits, on the 11th and 12th days of November, in the year 1802, being then judge of the district court in and for the district of New Hampshire, did appear on the bench of the said court for the administration of justice in a state of total

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intoxication, produced by the free and intemperate use of intoxicating liquors; and did then and there frequently, in a most profane and indecent manner, invoke the name of the Supreme Being, to the evil example of all the good citizens of the United States; and was then and there guilty of other high misdemeanors, disgraceful to his own character as a judge and degrading to the honor of the United States.

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

Signed by order and in behalf of the House.

NATHANIEL MACON, *Speaker.*
JOHN BECKLEY, *Clerk.*

He then delivered the articles at the table; whereupon,

The President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives, and they withdrew.

The court adjourned to 12 o'clock to-morrow.

In the House,[26] on the same day, Mr. Nicholson, from the managers appointed on the part of this House to conduct the impeachment against John Pickering, judge of the district court of the United States for the district of New Hampshire, reported that the managers did this day carry to the Senate the articles of impeachment agreed to by this House on the 30th ultimo, and the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2329. Pickering's impeachment continued.

In the Pickering case the rules were reported directly to the court of impeachment and agreed to therein.

Form of summons prescribed to command appearance of respondent in the Pickering impeachment.

Form of precept prescribed by the Senate to be indorsed on the writ of summons to Judge Pickering.

In the Pickering case the Senate provided for issuing subpoenas of a specified form on application of managers or of respondent or his counsel.

In the Pickering impeachment the subpoenas were directed to the marshal of the district wherein the witness resided.

The forms of summons and subpoena in the Pickering case were communicated to the House and entered on its Journal.

Form of direction to the marshal for service of subpoenas in the Pickering trial.

On January 5 [27] the Senate in high court of impeachment assembled, and the President administered the oath to Mr. Jonathan Dayton, of New Jersey.

On January 9,[28] in the high court, Mr. Tracy reported from the committee appointed to examine precedents and prepare forms. The Sen-

[26] House Journal, p. 515; Annals, p. 802.
[27] Annals, p. 322.
[28] Annals, p. 323; Senate Journal, p. 335.

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ate Journal makes no mention of this or other proceedings of the court, although the committee was appointed by the Senate.

On January 10 and 11 [29] the report was considered in the high court, and amendments were voted on and agreed to. The yeas and nays were taken, although it does not appear in what way they were ordered.

On January 12 [30] the report was agreed to as follows:

Resolved, That a summons issue, directed to the said John Pickering, in the form following:

"UNITED STATES OF AMERICA, *sc:*

"*The Senate of the United States of America, in their capacity of a court of impeachments, to John Pickering, judge of the district court for the district of New Hampshire, greeting:*

"Whereas the House of Representatives of the United States of America did, on the 4th day of January, exhibit to the Senate, then sitting as a court of impeachments, articles of impeachment against you, the said John Pickering, charging you with high crimes and misdemeanors, therein specially set forth in the words following, viz: [Here insert the articles]; and did demand that you, the said John Pickering, should be put to answer the accusations of high crimes and misdemeanors as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice. You, the said John Pickering, are therefore hereby summoned to be and appear before the Senate of the United States of America in their capacity of a court of impeachments, at their Chamber in the city of Washington, on the 2d day of March next, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States, acting in their said capacity of a court of impeachments, shall make in the premises, according to the Constitution and laws of the said United States. Hereof you are not to fail."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the independence of the United States the twenty-eighth.

Which summons shall be signed by the Secretary of the Senate and sealed with their seal, and served by James Mathers, Sergeant-at-Arms to the Senate, who shall serve the same pursuant to the directions given in the next following resolution:

Second. *Resolved*, That a precept shall be indorsed on said writ of summons in the form following, viz:

"UNITED STATES OF AMERICA, *ss:*

"*The Senate of the United States, in their capacity of a court of impeachments, to James Mathers, Sergeant-at-Arms to the Senate, greeting:*

"You are hereby commanded to deliver to and leave with John Pickering, esq., district judge of the district of New Hampshire, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence; and in whichever way you perform the service, let it be done at least thirty days before the appearance day mentioned in the said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day therein mentioned in said writ of summons."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this 12th day of January, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

Third. *Resolved*, That the Secretary of the Senate be, and he is hereby, directed to pay the necessary expenses arising upon the process aforesaid, after

[29] Annals, p. 323.
[30] Annals, pp. 323, 325.

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the same shall be allowed by the President of the Senate for the time being, out of the fund appropriated to defray the contingent expenses of the two Houses of Congress, and the Secretary of the Senate is hereby authorized and directed to advance out of said fund, to said James Mathers, for his traveling expenses, the sum of two hundred dollars, to be by said James Mathers accounted for in a final settlement for his services.

Fourth. *Resolved*, That the Secretary of the Senate do acquaint the House of Representatives of the foregoing resolutions, and deliver to them a copy of the same.

Mr. Tracy, from the committee last mentioned, further reported in part, and the report was amended, as follows:

Resolved, That whenever application shall be made to the Secretary of the Senate for a subpoena or subpoenas for witnesses by the House of Representatives, either by their managers of the impeachment or in any other proper way, or by the party impeached or his counsel, acknowledged as such by the Senate sitting as a court of impeachments, he shall issue to such applicant a subpoena or subpoenas in the following form, viz:

"To [here name the witnesses and residence] greeting: You and each of you are hereby commanded, laying aside all excuses, to appear before the Senate of the United States, in their capacity of a court of impeachments, on the——— day of ———, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before said court of impeachments for trial, in which the House of Representatives have impeached John Pickering, judge of the district court for the district of New Hampshire, of high crimes and misdemeanors. Fail not."

Witness, Aaron Burr, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed in every case to the marshal of the districts where such witnesses reside, to serve and return.

Resolved, That the Secretary of the Senate do issue twelve subpoenas for witnesses in the above form for the use of the said Pickering, with blanks therein for such witnesses as he, the said Pickering, may think proper to summon, which subpoenas shall be delivered by the Sergeant-at-Arms to him at the time he shall serve the summons aforesaid on the said Pickering.

As amended, the report was agreed to, yeas 23, nays 5.

It was then—

Ordered, That the Secretary lay these resolutions before the House of Representatives.

The above resolutions were communicated to the House by message on this day,[31] and on January 13 were read and laid on the table. The resolutions of the Senate are printed in full in the House Journal.

On January 13[32] the high court appears to have agreed on a "form of direction to the marshal for the service of the subpoena:"

[L. S.] THE SENATE OF THE UNITED STATES OF AMERICA, SITTING AS A COURT OF IMPEACHMENTS.

To the Marshal of the District of ——:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington this ——— day of ———, in the year of our Lord 1804, and of the Independence of the United States the twenty-eighth.

It does not appear that this form was communicated to the House of Representatives.

[31] House Journal, pp. 531, 533, 534.
[32] Annals, p. 326.

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2330. Pickering's impeachment continued.

Returns of the Sergeant-at-Arms on the summons and a subpoena in the Pickering trial were read in the court before the return day.

On February 9,[33] in the high court, the following returns were filed:

UNITED STATES OF AMERICA, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons, did proceed to the house of the within-named John Pickering on the 25th day of January, in the year 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said John Pickering.

JAMES MATHERS.

UNITED STATES OF AMERICA, *ss:*

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, did, on the twenty-sixth day of January, in the year one thousand eight hundred and four, proceed to the house of the within-named Michael McClary and served this subpoena by reading the same and leaving with him a copy thereof.

JAMES MATHERS.

On February 20 these returns were read in the high court.

2331. Pickering's impeachment continued.

Rules adopted by the Senate as a court to govern the trial of Judge Pickering.

The Senate sitting as a court did not communicate to the House the rules for governing the trial.

By the rules for the Pickering trial the President of the Senate was given general authority to direct forms of proceeding not otherwise provided for.

Form of oath taken by the Sergeant-at-Arms and entered on the record, on the making of the return of service of summons on Judge Pickering.

Rule framed to govern ceremonies for appearance and answer of respondent in the Pickering impeachment.

The rules for the Pickering trial provided that a record should be made if respondent appeared in person or by counsel, or if he failed to appear.

Rule for offering motions during the Pickering trial.

In the Pickering trial a rule provided that the Senate might retire for consultation on demand of one-third.

The rule of the Pickering trial required all decisions to be in open court, by yeas and nays, and without debate.

Form of oath and method of examination for witnesses in the Pickering trial.

Rule of the Senate, in the Pickering trial, for examination of a Senator.

The rules of the Pickering trial provided that a question by a Senator should be in writing and be put by the Presiding Officer.

On March 1[34] Mr. Tracy, from the committee appointed by the Senate to examine precedents and prepare forms, reported to the court (not to the Senate) the following resolutions, which were agreed to by the court:

[33] Annals, p. 326.
[34] Annals, pp. 326, 327; Senate Journal, p. 368.

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Resolved, That the President of the Senate shall direct all the forms of proceeding, while the Senate are sitting as a court to impeachments, as to opening, adjourning, and all forms during the session not otherwise specially provided for by the Senate.

And that the President of the Senate be requested to direct the preparations in the Senate Chamber for the accommodation of the Senate while sitting as a court, and for the reception and accommodation of the parties to the impeachment, their counsel, witnesses, etc.

And that he be authorized to direct the employment of the marshal, or any officer of officers of the District of Columbia during the session of the court of impeachments whose services he may think requisite and which can be obtained for the purpose.

And all the expenses arising under this resolution, after being first allowed by the President of the Senate, shall be paid by the Secretary, out of the fund appropriated to defray the contingent expenses of both Houses of Congress.

Resolved, That on the 2d day of March instant, at 1 o'clock, the legislative and executive business of the Senate be postponed, and that the court of impeachments shall then be opened, after which the process, which, on the 12th day of January last, was directed to be issued and served on John Pickering, and the return thereof, shall be read, and the Secretary of the Senate shall administer an oath to the returning officer in the following form, to wit:

"I, James Mathers, do solemnly swear that the return made and subscribed by me, upon the process issued on the 12th day of January last by the Senate of the United States against John Pickering, is truly made, and that I have performed said services as there described, so help me God."

Which oath shall be entered at large on the records.

The Secretary shall then give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, are ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

Resolved, That counsel for the parties shall be admitted to appear and be heard upon said impeachment. And upon the attendance of the House of Representatives, their managers, or any person or persons admitted to appear for the impeachment, the said John Pickering shall be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears. If he does not appear either personally or by agent or attorney the same shall be recorded. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and, if he shall require it, shall be committed to writing and read at the Secretary's table, and after the parties shall be heard upon such motion the Senate shall retire to the adjoining committee room for consideration, if one-third of the members present shall require it; but all decisions shall be had in open court, by ayes and noes and without debate, which shall be entered on the records.

Witnesses shall be sworn in the following form, viz: "I, A B, do swear (or affirm, as the case may be) that the evidence I shall give to this court in the case now depending shall be the truth, the whole truth, and nothing but the truth, so help me God."

Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

If a Senator is called as a witness he shall be sworn and give his testimony standing in his place.

If a Senator wishes a question to be put to a witness it shall be reduced to writing and put by the President.

These rules were not communicated to the House of Representatives.

2332. Pickering's impeachment continued.

Ceremonies at the calling of Judge Pickering to answer the articles of impeachment.

The House did not accept the invitation of the Senate to accompany its managers at the return of summons in Pickering's impeachment.

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On the same day, in the high court, the summons to John Pickering was read, together with the return made thereon by the Sergeant-at-Arms, and the oath prescribed was administered to the returning officer by the Secretary.

Subpoenas having been issued in the form prescribed and directed to Ebenezer Chadwick and others, the following return was made to them respectively:

NEW HAMPSHIRE DISTRICT, *ss:*

January 28, 1804.

Pursuant to this precept, I have served the same by reading it to the within-named Ebenezer Chadwick, etc.

MICHAEL MCCLARY,
Marshal for the New Hampshire District.

Then it was, by the high court of impeachments—

Ordered, That the Secretary give notice to the House of Representatives that the Senate, in their capacity of a court of impeachments, are ready to proceed upon the impeachment of John Pickering in the Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives, and that the Secretary communicate a copy of the regulations agreed on to that House.

On March 2 [35] the substance of this order was by message communicated to the House, whereupon it was—

Resolved, That the managers appointed on the 2d of January last do now attend in the Senate Chamber for the purpose of conducting the impeachment against John Pickering on the part of this House.

It does not appear that attendance by the House itself was proposed.

Thereupon the managers attended in the high court, whereupon John Pickering was three times called to answer the articles of impeachment exhibited against him by the House of Representatives, but came not.

2333. Pickering's impeachment continued.

No appearance was made on behalf of Judge Pickering and no answer was made to the articles of impeachment.

In the Pickering impeachment counsel for respondent's son presented a petition of the latter setting forth that his father was insane, and asking for time to show this.

In the Pickering case, against the objection of the managers, the court determined to hear the counsel of respondent's son and evidence to show the insanity of the accused.

On a question of permitting counsel for respondent's son to appear in the Pickering trial, the said counsel was not permitted to argue.

The Vice-President then submitted a petition of Jacob S. Pickering, son of John Pickering, and a letter from Robert G. Harper, inclosed to the Vice-President.

PETITION OF JACOB S. PICKERING.

At a court of impeachments holden before the honorable the Senate of the United States of America, sitting in their capacity of a high court of impeachment at the city of Washington, on the 2nd day of March, 1804:

[35] House Journal, p. 613; Annals, p. 1087.

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The House of Representatives of the United States *v.* John Pickering, judge of the district court for the district of New Hampshire.

Jacob S. Pickering, of Portsmouth, in the district of New Hampshire, and son of the said John Pickering, against whom articles of impeachment have been exhibited by the House of Representatives of the United States, conceives it his duty most respectfully to state to this high and honorable court the real situation of the said John Pickering, the facts and circumstances relative to said articles, wherein he stands charged of supposed high crimes and misdemeanors, and to request that this court would grant him such term of time as they shall think fit and reasonable to substantiate this statement.

Your petitioner will be able to show that at the time when the crimes wherewith the said John stands charged are supposed to have been committed, the said John was, and for more than two years before, and ever since has been, and now is, insane, his mind wholly deranged, and altogether incapable of transacting any kind of business which requires the exercise of judgment, or the faculties of reason; and, therefore, that the said John Pickering is incapable of corruption of judgment, no subject of impeachment, or amenable to any tribunal for his actions.

That this derangement has been constant and permanent, every day of his life completely demonstrating his insanity; every attempt for his relief, which has been prescribed by the faculty who have been consulted on his case, has proved unavailing, and his disorder has baffled all medical aid.

Your petitioner is well aware that the most conclusive evidence of the aforegoing fact would result from an actual view of the respondent, which unfortunately, by reason of his great infirmities can not now be, but at the hazard of his life—he is wholly unable at this inclement season to support the fatigue of so long a journey; yet if the respondent's life be spared, and his health in any degree restored, it will be the endeavor of your petitioner that the said John shall make his personal appearance before this honorable court at any future day they shall think proper to assign.

Your petitioner will be able to show, any pretense to the contrary notwithstanding, that the decisions made in the cause stated in the first article of impeachment, although not the result of reflection, or grounded on any deductions of reason, were, nevertheless, correct, perfectly consonant to the principles of justice, and conformable to the laws of the land; and the refusal of the said judge to grant the appeal claimed by the said John S. Sherburne, in behalf of the United States, was not against law, or to the injury of the public revenue, as the third article of the impeachment supposes; there being no law to warrant such appeal in such a case.

While, with deep humility, your petitioner admits and greatly laments the indecorous and improper expressions used by the said judge on the seat of justice, as mentioned in the last article of impeachment, he will clearly evince the injustice of that part thereof which respects his moral character, and show abundantly, that from his youth upward, through a long, laborious and useful life, and until he was visited by the most awful dispensation of Providence, and the most deplorable of all human calamities, the loss of reason, he was unexceptionable in his morals, remarkable for the purity of his language, and the correctness of his habits, and the deviations in these particulars now complained of, are irresistible evidence of the deranged state of his mind.

When this high and honorable court shall take into their consideration the situation of this respondent, oppressed with infirmity, incapable of making arrangements for his defense, the inclemency of the season, his great distance from the place of trial, and the shortness of notice—when your honors reflect on the high and atrocious crime with which he stands charged; in the decision of which is involved, not his life (indeed his remains of life would be but a slender sacrifice), but that which, to an honest mind, is more dear than life itself, his good name—when you advert to the consequences attached to a conviction; the indelible stigma which will befall a numerous family whose only patrimony was the unsullied reputation of their parent, which they have ever cherished, and of which they fondly, perhaps too fondly, hoped, no time, or circumstance, or adverse fortune could deprive them—when your honors shall think of these things, your petitioner has strong confidence that the wisdom and justice of this court will permit a respondent, whose integrity until now has been unquestioned; who has sustained offices high and honorable, through a long life, and the general tenor of whose character and conduct has hitherto furnished him with a coat of armor against the assaults of his enemies, but who is now incapable of defending himself, to be defended by his friends.

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Audi alteram partem is a maxim held in reverence wherever liberty yet remains. The Senate of America will be the last tribunal on earth that will cease to respect it; they will never condemn unheard; they will never refuse time for a full and impartial trial.

That time, that impartial trial, your petitioner prays for; the charity of the law presumes the innocence of the respondent; and your petitioner, also, respectfully entreats that, in the meantime, and more especially as the evidence on which the impeachment is founded, was taken ex parte, no unfavorable impressions may be made on the minds of this honorable court, by any report or extrajudicial representations which may have been made on the subject before them.

JACOB S. PICKERING.

LETTER OF ROBERT G. HARPER

SIR: Mr. Jacob S. Pickering, the son of Judge Pickering, of New Hampshire, has forwarded to me, through one of his friends here, the inclosed petition, with a request that I will lay it before the court of impeachments, and will appear on his part, if permitted, and support the prayer of it. I am also furnished with several depositions, showing that Judge Pickering, from bodily infirmity and total derangement of mind, is wholly incapable of appearing before the court at this time, of making a defense, or of giving authority to any person to appear for him.

The process of subpoena heretofore issued by the court not being compulsory, and Judge Pickering's narrow circumstances not enabling his son to defray the expenses of the witnesses whose testimony it is important for him to produce, it was judged necessary to serve the subpoena. The object of the petition is to obtain a postponement of the trial, and either compulsory process, or an order to take depositions, which may be received in evidence. Be pleased, sir, to lay the petition before the court, and to inform me whether I shall be received to appear on the part of the petitioner, Mr. Jacob S. Pickering, in its support. In that case I will attend in the capacity of agent or counsel for the petitioner, and submit to the court the reasons and proofs with which I am furnished in support of his application.

With the highest respect, I have the honor to be, sir, your most obedient very humble servant,

ROBERT G. HARPER.

The VICE-PRESIDENT OF THE UNITED STATES.

The President inquired if Mr. Harper was in court, and invited him to a seat within the bar, which having taken, he made the following address:

Mr. President: Before I proceed to address this honorable court in the case now before it, I think it proper to repeat explicitly what is stated in the letter just now read, that I do not appear as the counsel, agent, or attorney of Judge Pickering, or by virtue of any authority derived from him, he being in a state of absolute and long-continued insanity, can neither appear himself nor authorize another to appear for him. I present myself to this honorable court, at the request of Jacob S. Pickering, son of Judge Pickering, stating his father's insanity, and praying that time may be allowed for collecting and producing complete proof of the melancholy fact. This application for postponement I am prepared to support by depositions now in my possession; and it is also my intention, if permitted, to make a further application on the part of Judge Pickering for compulsory process to compel the attendance of such witnesses as it may be necessary to produce in proof of the fact of insanity, or for an order to take their depositions in writing on interrogatories, and notice to the prosecutors. It rests with this honorable court whether it will receive such an application, and hear counsel so appearing in its support.

After a short pause, Mr. Harper again rose and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering by counsel.

The President [36] answered that he presumed that it would not be so construed.

[36] Aaron Burr, of New York, Vice-President and President of the Senate.

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Mr. Nicholas, on behalf of the House managers, objected to the hearing of Mr. Harper in any other capacity than as counsel of the accused, and remarked that as Mr. Harper disclaimed appearing in that capacity, he could not in his opinion be heard. Other managers spoke, especially Mr. Rodney, who said:

I understand the President as having declared that, agreeably to the rules of proceeding adopted by the Senate, no person can be heard in this case but the accused, or his agent or counsel.

The Vice-President nodded assent.

Mr. Rodney continued:

I also understand the gentleman who appeared on this occasion, as clearly and explicitly stating that he does not appear as the counsel of Mr. Pickering, nor does he wish it so to be understood. That gentleman has informed us in a very fair and candid manner of the only character in which he does appear, and has assumed very properly and correctly the only ground upon which he wishes to stand. He has in positive terms disavowed the idea of his being the agent or counsel of the accused, because he has protested against Mr. Pickering's being affected by any act done by him. On this single ground, then, I respectfully submit whether it would be proper to hear the gentleman under these circumstances, and whether it be not manifested that he does not come within the rules laid down by the Senate for the government of this high court of impeachments.

But if the gentleman is to be heard on this subject in the anomalous character in which he appears, with a view of postponing the proceedings of this court, it will first be necessary for the court to decide that the case is properly before them, agreeably to the rules which have been established. If no appearance in person or by attorney has been entered, unless proceedings have been had which they shall consider tantamount to an appearance, there is no cause regularly in court, and it would be idle for any person to talk of postponing the consideration of that which really was not before the court. A question of this kind must, from the nature of it, ever be incidental to the principal or main question. When a writ is in court according to the rules of the court, a motion for postponment may, with propriety, if the circumstances justify it, be made. This must always be a subsequent consideration, after the court are in full possession of the case. Agreeably to the correct course of proceeding in ordinary courts, until bail and appearance, there can be no case in court. The party has no day given him, because he is, until this takes place, considered to be out of court; nor would any counsel, though duly authorized, be heard in his behalf. There has, in this case, then, been no appearance in person or by agent or counsel. The accused has made default, and no agent or attorney has been recorded for him. Surely, then, his default should be first recorded, and if the court consider that after his having been duly served, and making default, they will proceed to a hearing and determination of the principal question, it will then be proper to listen to those which are necessarily incidental. It will be at this stage of the business competent for the court, if at all, to hear the gentleman. But I am decidedly of the opinion there is no period in which it will be proper so to do unless he claims this right as the agent or counsel of the accused. In that capacity he has a right to be heard; and in that capacity alone. Our Constitution has wisely secured to every man this privilege, and I would not deprive the humblest object in the community of this inestimable benefit. I flatter myself, therefore, that this honorable court will adhere strictly to the rules which they have prescribed for themselves, and that they will for these reasons, and those which have been assigned by my colleague, refuse the present application.

Mr. Harper inquired whether it would be regular in him to reply to these remarks?

The President said it would not: and immediately after put the question to the Senate, whether Mr. Harper should be heard in support of the prayer of the petition of Jacob S. Pickering.

Whereupon the Senate retired to a private Chamber, from which they returned about 3 o'clock, when the President advised the managers that the Senate would take further time to consider the question before them, and would make them acquainted with their decision.

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Finally, with open doors, the court took a vote on the question:

Will the court hear evidence and counsel respecting the insanity of John Pickering, upon the suggestion contained in the petition of Jacob S. Pickering, and the letter of R. G. Harper?

It was decided in the affirmative, yeas 18, nays 12.

It was then—

***Resolved,* That, on the motion made and seconded, the court shall retire to the adjoining committee room, if one-third of the Senators present shall require it.**

The court adjourned to 12 o'clock the next day.

2334. Pickering's impeachment continued.

The court having determined, in the Pickering impeachment, to hear counsel of a third person on a preliminary question, the managers withdrew to consult the House.

The Senate declined to await the consultation of the managers with the House before hearing evidence as to Judge Pickering's sanity.

The House, in the Pickering impeachment, deemed it unnecessary to approve the conduct of its managers in declining to discuss in the court a matter from a third party.

In the Pickering case the Presiding Officer ruled that in presenting affidavits to show the insanity of the accused only the pertinent parts should be read.

The Presiding Officer held that counsel of the son of Judge Pickering, admitted to show the insanity of the accused, might not offer a motion to the court.

On March 6,[37] the court was opened, and the managers of the impeachment, on the part of the House of Representatives, against John Pickering, attended.

Mr. Harper also attended.

The President informed Mr. Harper that the court would hear evidence and counsel respecting the insanity of John Pickering upon the suggestion contained in the petition of Jacob S. Pickering and the letter of R. G. Harper.

Mr. Nicholson, in behalf of the managers, said he was instructed to ask for the reading of the proceedings of the court on the last day of its sitting.

The clerk having read the record, by which it appeared that John Pickering had been called three times without appearing.

Mr. Nicholson inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a step preliminary to the trial.

The President said he could not undertake to give an explanation of the proceedings of the Senate, adding that their meaning must be gathered from the proceedings themselves.

Mr. Nicholson then said that he begged leave to state that the managers were ready to proceed with the trial of the articles preferred by the House of Representatives.

The President said that under the decision of the Senate it had been determined in the first instance to hear Mr. Harper in support of the petition of Jacob S. Pickering.

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[37] Annals, p. 333.

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Mr. Nicholson said he was instructed by the managers again to state that they were ready to support the articles of impeachment. They, however, not being at present under the consideration of the Senate, they did not consider themselves under any obligation to discuss a preliminary question raised by a third person unauthorized by the person charged. He was therefore instructed to state to the Senate that the managers would, under these circumstances, retire, and take the opinion of the House of Representatives respecting their further procedure.

The managers thereupon retired.

Then a proposition that the Senate retire to its private chamber was disagreed to, only six voting aye.

Mr. John Quincy Adams, apparently to second a suggestion of Mr. James Jackson, of Georgia, that proceedings should be delayed until the Senate had heard from the managers of the House of Representatives, moved an adjournment, but the motion was disagreed to, only 10 voting aye.

A motion by Mr. Robert Wright, of Maryland, that the counsel in support of the petition of J. S. Pickering be not heard until the return of the managers, or until their intention should be signified, was disagreed to, the ayes being seven.

Then Mr. Harper rose and presented affidavits, evidently ex parte, to show the insanity of Judge Pickering. One affidavit expressing the opinion that Judge Pickering could not "from his bodily infirmities" proceed on a journey to Washington, was ruled out by the President, as the order of the Senate confined the proof to the single allegation of insanity. On the presentation of another affidavit the President ruled that only the parts relating to insanity should be read.

After the reading of the affidavits,[38] Mr. Harper said this was the testimony on which he founded the application—which was to postpone the trial until such time as the court might think fit, in order to take depositions.

The President said:

> It does not seem to me proper to receive any motion from you. The Senate will attend to what you have said and take proper order upon it.

Mr. Harper thereupon addressed the court briefly, expressing the wish that opportunity should be allowed and the necessary facilities afforded to obtain testimony.

The court thereupon adjourned.

In the House of Representatives,[39] meanwhile, a short time after the managers returned from the court, Mr. Nicholson, in their behalf, made to the House of Representatives the following communication:

> That on Friday, the 2d of March, the managers, agreeably to the directions of the House, appeared at the bar of the Senate, to support the said articles of impeachment, when John Pickering was three times solemnly called, but did not answer or appear, either in person or by counsel. The President of the Senate then stated that he had received a letter, signed R. G. Harper, accompanying a petition, signed Jacob S. Pickering, who called himself the son of the party charged. The petition being read, was found to contain a statement of a variety of matter, particularly the insanity of Judge Pickering, upon which the prayer of the petition was founded for a postponement of the trial to some future day. Mr. Harper was called to the bar of the Senate; he entered, and stated that he wished it to be distinctly understood that he did not appear at the bar of the

[38] Annals, p. 342.
[39] House Journal, pp. 625, 626; Annals, p. 343.

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Senate as counsel for John Pickering, from whom he had received no authority for that purpose; but that his object was to support the facts contained in the petition of Jacob S. Pickering, and the prayer thereof. There was a short pause, when Mr. Harper rose again and inquired whether his appearance in support of the petition would be construed as the appearance of John Pickering, by counsel. The President of the Senate answered, he presumed that Mr. Harper's appearance would not be considered as the appearance of John Pickering by counsel.

The managers, under these circumstances, felt themselves bound to object to Mr. Harper's being heard in any other capacity than as counsel for the party who was impeached; and briefly stated their reasons for the objection.

The Senate withdrew to a private chamber, where it is presumed the question was debated. The managers again appeared at the bar of the Senate this day, and were informed by the President that it had been resolved to hear Mr. Harper in support of the allegations contained in the petition of Jacob S. Pickering, and the prayer thereof. The managers inquired at what point of time it was intended that Mr. Harper should be heard, and whether this was to be a measure preliminary to the trial. The President of the Senate declared that he could not undertake to explain the resolutions of the Senate, but that their sense must be collected from the resolutions themselves. The managers then offered themselves ready for trial, declaring that they were prepared to open the prosecution on behalf of the House of Representatives, and that the witnesses were ready to prove the facts charged in the articles of impeachment. Upon this offer being made, the President of the Senate stated that he considered it to be the sense of the Senate that Mr. Harper was to be heard before the trial commenced.

The managers considered this as an irregular step, and not believing that they ought to discuss any petition presented to the Senate from a person who was not a party to the impeachment, and this, too, before the party charged, although duly notified, had appeared, either in person or by attorney, withdrew from the Senate Chamber. They will not feel themselves either bound or authorized to appear again until the Senate shall inform them that they are prepared to proceed in the trial, unless specially directed by this House.

Mr. John Smilie, of Pennsylvania, thereupon proposed the following:

Resolved, That this House doth approve of the conduct of the managers appointed to support the articles of impeachment in the case of John Pickering, as stated in their report of this day, and that the said managers do not appear at the bar of the Senate, until they shall be specially instructed by this House.

There was objection to the resolution on the ground that it was not necessary for the House to express its opinion of the conduct of the managers at every stage. There was so much objection that Mr. Smilie on the next day withdrew the resolution.

2335. Pickering's impeachment, continued.

After hearing evidence as to the sanity of the accused, the court of impeachment notified the House of its readiness to hear the managers on the articles.

There being no appearance for Judge Pickering, witnesses presented by the managers were not cross-examined, except for a few questions by the Presiding officer.

On March 7,[40] in the high court of impeachments, it was ordered that the Secretary inform the House of Representatives that the court was open and ready to receive and hear the managers in support of the articles of impeachment. This motion was agreed to by a vote of yeas 19, nays 8.

Accordingly, on March 8,[41] the court was opened, the managers attended, and one of them, Mr. Early, after opening remarks, pro-

[40] Annals, p. 345; House Journal, pp. 626, 627.
[41] Annals, p. 345. The Senate Journal simply records the fact of the sitting of the court of impeachments on this as on other days.

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ceeded to produce testimony in support of the first article of impeachment, and then, in order, evidence supporting the other articles. This evidence consisted of the reading of statutes of the United States, an attested copy of the record of the court, with the seal of said court annexed, and the examination of witnesses.

Judge Pickering not being represented by counsel, the witnesses were not cross-examined, except in certain instances [42] when the President addressed questions to a witness.

The testimony tended to substantiate the charge that the said judge was an inebriate.

Mr. Nicholson then informed the court that the managers here closed the testimony, and then the managers withdrew.

2336. Pickering's impeachment, continued.

No defense being made in the Pickering impeachment, the two Senators from the State of the accused were examined at suggestion of the court.

In the Pickering case one of the managers submitted the case finally without extended argument.

The Senate declined to postpone the Pickering trial after the evidence had been submitted.

On March 9,[43] on the suggestion of Mr. Tracy, the Senator who was chairman of the committee having in charge the preparation of forms of procedure of the trial, Simeon Olcott and William Plumer, the Senators from New Hampshire, were respectively sworn and affirmed. They testified that in their opinion the troubles of Judge Pickering were not due to intemperance. Mr. Plumer thought the intemperance the result of insanity.

Four witnesses were introduced, at whose suggestion does not appear, and testified in rebuttal.

Mr. Nicholson then observed that the managers would withdraw for a few minutes. Accordingly they withdrew, and shortly returned.

Mr. Nicholson then, in their behalf, addressed the court briefly, saying that he was directed by the managers to inform the court that they submitted the articles on the evidence offered, entertaining no doubt of full justice being done by the decisions of the Senate.

Thereupon the managers retired.

Mr. Tracy then offered the following motion:

Resolved, As the opinion of this court, that the proceedings on the articles of impeachment exhibited by the House of Representatives against John Pickering be postponed to the —— day of —— next.

This resolution was disagreed to, yeas 10, nays 20.

Thereupon the court adjourned to the next day.

2337. Pickering's impeachment, continued.

In the absence of the Vice-President a President pro tempore was chosen to preside over the court trying Judge Pickering.

The Senate informed the House of the day and hour fixed for pronouncing judgment in the Pickering impeachment.

The court of impeachment declined to postpone judgment until Judge Pickering could be brought personally before it for inspection as to sanity.

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[42] Annals, p. 357.
[43] Annals, pp. 359, 362.

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On March 10[44] the record of the court of impeachment shows:

Mr. Franklin was chosen President pro tem.

The Journal of the Senate for this day shows that the Vice-President was absent and that the Senate chose Mr. Jesse Franklin, of North Carolina, President pro tempore.[45]

On this day, also the Senate, before sitting as high court of impeachments, ordered,[46] by a vote of yeas 20, nays 9—

That the Secretary do acquaint the House of Representatives that the court of impeachments will, on Monday at 12 o'clock, proceed to pronounce judgment on the articles of impeachment exhibited by them against John Pickering.

Afterwards, the high court of impeachments having convened, Mr. Samuel White, of Delaware, submitted the following:[47]

Resolved, That this court is not at present prepared to give their final decision upon the articles of impeachment preferred by the House of Representatives against John Pickering, district judge of the district of New Hampshire, for high crimes and misdemeanors, the said John Pickering not having appeared, or been heard, by himself or by counsel; and it having been suggested to the court by Jacob S. Pickering, son of the said John Pickering, that the said John Pickering, at the time of the conduct charged against him in the said articles of impeachment as high crimes and misdemeanors, was, and yet is, insane, which suggestion has been supported by the testimony of two members of the court and by the affidavits of sundry persons, whose integrity is unimpeached; and it being further suggested in the said petition that at such future day as the court may appoint the body of the said Pickering shall be produced in court, and further testimony in his behalf, which will enable the court to judge for themselves as to the insanity of the said John Pickering and to act more undertsandingly in the premises: but that the said John Pickering, owing to bodily infirmity, could not be brought to court at present, at so great a distance, and at this inclement season of the year, without imminent hazard of his life.

Mr. Wilson Carey Nicholas, of Virginia (not Mr. Nicholson, the House manager) and Mr. Robert Wright, of Maryland, and others, objected to the resolution as not being in order.

Mr. Joseph Anderson, of Tennessee, asked if it would be in order to move an amendment to it.

Mr. John Quincy Adams, of Massachusetts, said he would object to any amendment to it, as, by the rule of the court, a gentleman had a right to a vote upon any specific proposition he might please to submit connected with the trial.

Mr. Samuel White, of Delaware, called for the reading of the rule.

Mr. Anderson then moved that the resolution submitted by the gentleman from Virginia yesterday be taken up as being entitled to be acted upon first.

The President pro tempore declared that the resolution of the gentleman from Delaware was fairly before the court and must be disposed of in some way before anything else could be taken up.

A motion for postponing the further consideration of it was then made and withdrawn.

Mr. Nicholas hoped it would not be permitted to go upon the journals of the court.

Mr. Jackson moved the previous question, viz: "Shall the main question be now put?"

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[44] Annals, p. 362; Senate Journal, p. 372.

[45] It seems hardly necessary to support that the court of impeachments ratified this selection of the Senate. The records of the court are not made with technical care, and the entry probably refers to action of the Senate.

[46] Senate Journal, p. 373; House Journal, p. 632. The record of the court of impeachment also shows the adoption of this order.

[47] Annals, p. 362.

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Mr. White hoped that whatever question should be taken on the subject should be by yeas and nays; that his resolution and the manner in which it might be got rid of should be seen and understood.

Mr. Anderson then moved to amend the resolution by striking out the words, "not having been heard by himself or counsel," and all after the words "was, and yet is, insane" to the end of the resolution.

On motion of Mr. Jonathan Dayton, of New Jersey, the gallaries were cleared and the doors closed.

At 3 o'clock the doors were opened and the question was taken upon the resolution as at first submitted—yeas 9, nays 19.

So the resolution was disagreed to.

2338. Pickering's impeachment, continued.

The House attended its managers to the Senate to hear the Senate pronounce judgment in the Pickering impeachment.

The House having heard judgment in the Pickering impeachment, the managers made no report, and no record appears on the House Journal.

On March 12,[48] in the House of Representatives, it was

Ordered, That this House do now attend in the Senate Chamber to hear the Senate, in their capacity of a court of impeachments, pronounce judgment on the articles of impeachment exhibited against John Pickering, judge of the district court of the United States for the district of New Hampshire, agreeably to the notification contained in a message from the Senate, by their Secretary, on Saturday last.

The Speaker, attended by the Members, accordingly withdrew to the Senate Chamber for the purpose expressed in the foregoing order; and being returned, etc., proceeded to other business. The House Journal has no record of the decision of the court.

2339. Pickering's impeachment continued.

The court determined to confine the question in the judgment on Judge Pickering to the simple question of guilt on the charges.

The court, in the Pickering judgment, declined to permit an expression as to whether the offenses constituted high crimes and misdeameanors.

In conformity with English precedents the Senate pronounced judgment, article by article, in the Pickering case.

The final question in the Pickering judgment was on the removal of the accused from office.

Meanwhile, on the same day, the Court of Impeachment had convened, and Mr. Samuel White, of Delaware, inquired whether the question was to be taken on each article separately, as practiced in the House of Lords, or on the whole together. He hoped upon each separately, as gentlemen might wish to vote affirmatively on some and negatively on others, from which privilege they must be precluded by giving but one general vote of guilty or not guilty. He would, therefore, beg leave to submit to the consideration of the court the following as the form of the question to be put to each member upon each article of impeachment, viz:

Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the—article of impeachment or not guilty?

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[48] House Journal, pp. 642, 643; Annals, p. 1169.

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For this form of question, Mr. White observed, he could adduce precedent. It was nearly the same as was used in the very celebrated case of Warren Hastings, and he presumed would collect the sense of the court with as much certainty as any that could be proposed, which was his only object.

After some conversation, Mr. Joseph Anderson, of Tennessee, moved the following as the form and prayed that it might be taken up:

Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the—article of impeachment exhibited against him by the House of Representatives?

The President pro tempore declared that it would not be in order to take it up till the motion of the gentleman from Delaware was acted upon, as it was first before the court and had not yet been disposed of in any way, and was about to put the question following upon it, when—

Mr. Joseph Anderson, of Tennessee, mentioned that he had objections to the form of question proposed by the gentleman from Delaware and moved to strike out the words "of high crimes and misdemeanors."

On motion, the galleries were cleared and the doors closed. After some debate, Mr. White's form of question was lost—only 10 voting in favor of it and 18 against it.

Mr. Anderson's form was then adopted—yeas 18, nays 9.

Mr. White stated that he believed Judge Pickering had practiced much of the indecent and improper conduct charged against him in the articles of impeachment; that he had been seen intoxicated and heard to use very profane language upon the bench; that he had acted illegally and very unbecoming a judge in the case of the ship *Eliza*, as charged against him in the articles, but that he was very far from believing that any part of his conduct amounted to high crimes and misdemeanors or that he was in any degree capable of such an offense, because, after the testimony the court had heard, scarcely a doubt could remain in the mind of any gentleman but that the judge was actually insane at the time; and Mr. White wished to know whether it was to be understood by the two last votes just taken that the court intended only to find the facts and to avoid pronouncing the law upon them; that they could have it in view to say merely that Judge Pickering had committed the particular acts charged against him in the articles of impeachment and upon such a conviction, to remove him, without saying directly or indirectly whether those acts amounted to high crimes and misdemeanors or not; for in the several articles they are not so charged, though judgment is demanded upon them as such. Upon such a principle and by such a mode of proceeding good behavior, he observed, would be no longer the tenure of office; every officer of the Government must be at the mercy of a majority of Congress, and it would not hereafter be necessary that a man should be guilty of high crimes and misdemeanors in order to render him liable to removal from office by impeachment, but a conviction upon any facts stated in articles exhibited against him would be sufficient.

Mr. Jonathan Dayton, of New Jersey, observed that the honorable gentleman from Virginia seemed to be offended at the language of his honorable friend from Delaware, who, in speaking of the proceedings on the impeachment, had called them a mere mockery of

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trial. To such terms, however, the ears of that honorable gentleman must be accustomed and accommodated, for, whilst either he or his friend had the honor of a seat in that body, they should designate this trial by no other character. It deserved no better appellation and would be thus characterized in all parts of the United States where these proceedings could be seen and understood.

That the conclusion of this exhibition might perfectly correspond with its commencement and progress, that the catastrophe might comport with the other parts of the piece, the Senate were now to be compelled, by a determined majority, to take the question in a manner never before heard of on similar occasions. They were simply to be allowed to vote, whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the Senate was to follow, without any previous question whether those facts amounted to a high crime and misdemeanor. The latest reason of this course was, Mr. Dayton said, too obvious. There were numbers who were disposed to give sentence of removal against this unhappy judge, upon the ground of the facts alleged and proved, who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane and to have been so ever since, even to the present moment. The Constitution gave no power to the Senate, as the High Court of Impeachments, to pass such a sentence of removal and disqualification, except upon charges and conviction of high crimes and misdemeanors. The House of Representatives had so charged the judge and had exhibited articles in maintenance and support, as they themselves declared, of those charges. The Senate had received and heard the evidence adduced by the managers and had gone through certain forms of a trial, and they now, by a majority, dictated the form of a final question the most extraordinary, unprecedented, and unwarrantable. For himself, Mr. Dayton said, he felt at a loss how to act. He was free to declare that he believed the respondent guilty of most of the facts stated in the articles, but, considering the deranged state of intellect of that unforunate man, he could not declare him guilty of the words of the Constitution; he could not vote it a conviction under the impeachment. Let the question be stated, as had been proposed by his honorable friend from Delaware, agreeably to the form observed in the well recollected case of Warren Hastings:

> Is John Pickering guilty of a high crime and misdemeanor upon the charge contained in the first, the second, the third, or the fourth article of the impeachment, or not guilty?

Or, if the court preferred it, he should have no objection against taking the preliminary question, whether guilty of the facts charged in each article, provided they would allow it to be followed by another most important question, viz: Whether those facts, thus proved and found, amounted to a conviction of high crimes and misdemeanors, as charged in the impeachment, and expressly required by the Constitution. Both these forms of stating the question were, it was now too evident, intended to be refused by the majority, and thus a precedent established for removing a judge in a manner unauthorized by that charter.

Mr. White asked whether, after the question now before the court—which goes merely to settle, as gentlemen themselves believe, the point

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whether Judge Pickering has committed the particular acts charged against him in the articles of impeachment or not—should be decided, it would then be in his power to obtain a vote of the court upon another question which, without presenting at present, he would state in his place, viz: Is it the opinion of this court that John Pickering is guilty of high crimes and misdemeanors, upon the charges exhibited against him in the articles of impeachment preferred by the House of Representatives?

The President pro tempore replied that he thought such a motion could not be received after the vote had been taken.

Mr. Wright submitted the following as the final question, viz:

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

This form was agreed to.

2340. Pickering's impeachment, continued.

In the Pickering impeachment certain Senators retired from the court because dissatisfied with form of the question on final judgment.

Messrs. John Armstrong, of New York; Stephen R. Bradley, of Vermont; David Stone, of North Carolina; Jonathan Dayton, of New Jersey; and Samuel White, of Delaware, retired from the court. The two last not because they believed Judge Pickering guilty of high crimes and misdemeanors, but because they did not choose to be compelled to give so solemn a vote upon a form of question which they considered an unfair one, and calculated to preclude them from giving any distinct and explicit opinion upon the true and most important point in the case, viz, as to the insanity of Judge Pickering, and whether the charges contained in the articles of impeachment, if true, amounted in him to high crimes and misdemeanors or not.

2341. Pickering's impeachment, continued.

In final judgment the court found Judge Pickering guilty in all the articles and decreed his removal from office.

Final judgment being pronounced, the court of impeachment in Pickering's case adjourned sine die.

The question was then taken in the presence of the managers and of the House of Representatives, and decided as follows:

On the question—

Is John Pickering, district judge of New Hampshire, guilty as charged in the first article of impeachment exhibited against him by the House of Representatives?

It was determined in the affirmative, yeas 19, nays 7.

The same question was put, in the same way, on the three remaining articles, and decided by a like result.

On the question—

Is the court of opinion that John Pickering be removed from the office of judge of the district court of the district of New Hampshire?

It was determined in the affirmative, yeas 20, nays 6.

The court then adjourned sine die.

The Senate Journal [49] records simply the fact of the sitting and adjournment of the court, as on other days, and makes no mention of the result of the trial.

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[49] Senate Journal, p. 374.

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The Impeachment and Trial of Samuel Chase*

1. Preliminary investigation as to Judges Chase and Peters. Sections 2342, 2343.
2. Preparation of articles. Section 2344.
3. Appointment of managers. Section 2345.
4. Articles and their presentation. Section 2346.
5. Writ of summons. Section 2347.
6. Rules of the trial. Section 2348.
7. Appearance and answer of respondent. Sections 2349–2351.
8. Replication of the House. Section 2352.
9. Presentation of testimony. Sections 2353–2354.
10. Order of final arguments. Section 2355.
11. Arguments as to nature of impeachment. Sections 2356–2362.
12. Final judgment. Section 2363.

2342. The impeachment and trial of Samuel Chase, associate justice of the Supreme Court of the United States, in 1804.

The investigation of the conduct of Richard Peters, United States district judge for Pennsylvania, in 1804.

The impeachment of Mr. Justice Chase was set in motion on the responsibility of one Member of the House, sustained by the statement of another Member.

In the case of Mr. Justice Chase the House, after long debate and a review of precedents, decided to order investigation, although Members could give only hearsay evidence as to the facts.

English precedents reviewed in the Chase case on the question of ordering an investigation on the strength of common rumor.

The House declined to state by way of preamble its reason for investigating the conduct of Mr. Justice Chase and Judge Peters.

Form of resolution authorizing the Chase and Peters investigation in 1804.

Two of the seven Members of the committee for the Chase investigation were from the number opposing the investigation.

Mr. John Randolph, who had moved the Chase investigation, was made chairman of the committee.

On January 5, 1804,[1] Mr. John Randolph, of Virginia, arising in his place in the House, spoke of the necessity of "preserving unpolluted the fountain of justice," and then said:

At the last session of Congress a gentleman from Pennsylvania did, in his place (on the bill to amend the judicial system of the United States, state certain facts in relation to the official conduct of an eminent judicial character, which I then thought, and still think, the House bound to notice. But the lateness of the session (for we had, if I mistake not, scarce a fortnight remaining) precluding all pos-

* Hinds' Precedents, vol. 3, p. 711 (1907).
[1] First session Eighth Congress, House Journal, p. 516, Annals, pp. 305–374.

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sibility of bringing the subject to any efficient result, I did not then think proper to take any steps in the business. Finding my attention, however, thus drawn to a consideration of the character of the officer in question, I made it my business, considering it my duty as well to myself as to those whom I represent, to investigate the charges then made, and the official character of the judge, in general. The result having convinced me that there exists ground of impeachment against this officer, I demand an inquiry into his conduct, and therefore submit to the House the following resolution:

"*Resolved*, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the associate justices of the Supreme Court of the United States, and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of this House."

Objection being made that the House should have further information before taking a step, which would cast discredit on the character of a judge, Mr. John Smilie, of Pennsylvania, who had made the statement in the preceding Congress referred to by Mr. Randolph, arose and, in the course of his remarks, said:

A man of the name of Fries was prosecuted for treason in the State of Pennsylvania. Two of the first counsel at that bar, Mr. Lewis and Mr. Dallas, without fee or reward, undertook his defense. I mention their names to show that there could have been no party prejudices that influenced them. When the trial came on the judge behaved in such a manner that Mr. Lewis declared that he would not so far degrade his profession as to plead under the circumstances imposed upon him. Mr. Dallas declared that the rights of the bar were as well established as those of the bench; that he considered the conduct of the judge as a violation of those rights and refused to plead. The facts were these: The judge told the jury and the counsel that the court had made up their minds on what constituted treason; that they had committed their opinion to writing, and that the counsel must therefore confine themselves to the facts in the case before the court. The counsel replied that they did not dispute the facts, but that they were able to show that they did not constitute treason. The end of the affair was that the counsel retired from court, and the man was tried without counsel, convicted, and sentenced to death.

After this the Attorney-General wrote a letter to Messrs. Dallas and Lewis, requesting them to furnish their notes and opinions for the use of the President. They drew up an answer, in which they stated that the acts charged against Fries did not amount to treason, but were only sedition, and that they were so considered in the British courts. This letter was read to me by Mr. Dallas. After receiving the letter the President pardoned the man.

A lengthy debate ensued as to whether or not, upon the facts before it, the House would be justified in agreeing to the resolution. It was objected [2] that the statements of the Member from Pennsylvania, Mr. Smilie, were not entitled to much weight, since they were not what he knew himself, but only what he had received from others. Moreover, he had charged only what amounted at most to an error of judgment on the part of the judge. Some facts, it was argued,[3] ought to be adduced, and so important a step should not be taken hastily. It was stated [4] that the most parliamentary way would be for a gentleman to state in the form of a resolution the grounds of impeachment and then to refer such a resolution to a select committee for investigation. But it would be novel and unprecedented for the House to institute, without facts before it, an inquiry into the character of a high officer of the Government. The voting of an inquiry, so it was declared,[5] would be considered equivalent to the expression of an opinion that the House had evidence of the probable guilt of the judge. It had been urged that

[2] By Mr. Joseph Clay, of Pennsylvania, Annals, p. 810.
[3] By Mr. Roger Griswold, of Connecticut, Annals, p. 813.
[4] By Mr. John Dennis, of Maryland, Annals, p. 814.
[5] By George W. Campbell, of Tennessee, Annals, p. 817.

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the House, in this case, had all the powers of a grand jury. But a grand jury had only the right to receive testimony. They might not send for it. If there was evidence in this case they might act on it, even though it be ex parte, although that would be going far. But so far there had been no statement satisfactorily showing probable cause. It was asserted,[6] that the opinion of any one Member, without presentation of facts, should not avail to set in motion this proceeding. The gentleman from Pennsylvania might have misconceived the information given to him. Objection was further made [7] that the proposed form of procedure was not warranted by the precedents. The case of Bolingbroke was not in point, since that impeachment was based on disclosures made during examination of the conduct of the ministry. In the Blount and Pickering cases the Executive had transmitted documents to the House. But in this case it was proposed to appoint a committee to search in the first instance for an accusation and then to look for proofs to justify it. The assertion was made [8] that there were no precedents to justify an assertion that common fame was sufficient ground for impeachment. The precedent of the Earl of Stratford was a gloomy and terrible precedent, unsusceptible of application under a Republican form of government. It was true that a member had risen in his place in the Commons and impeached Warren Hastings, but at the same time he exhibited specific charges of misconduct. The House was the grand inquest of the nation, and its practice ought to be in many respects analogous to that of a grand jury. It should not listen to murmurs and seek for guilt. The resolution before the House did not allege a single fact. It was urged [9] that never, so far as any precedents so far cited had shown, had an inquiry been commenced in Parliament without a statement of the facts to accompany the motion, and it was objected [10] that even if common rumor had once been ground for beginning proceedings in a period of rudeness and violence, the more improved system of modern jurisprudence should discard such a doctrine.

In favor of the resolution it was urged [11] that the purpose of the inquiry was to procure evidence. If the House already had the evidence there would be no need of the inquiry. The statement of a Member in his place, even though hearsay, was sufficient to cause inquiry. It was pointed out [12] that under the rules of the House—such was the respect due to a Member of the House—the statement of a Member that he possessed information proper to be communicated to the House was sufficient to cause the doors to be closed at once; and surely the request of a Member for a committee of inquiry ought to be of equal force. It was further urged [13] that the right to move an inquiry was one of the most important pertaining to the Representative. And it was pointed out [14] that the motion to inquire should not be confounded with the motion to impeach. There was, it was urged,[15] a great difference between the inquiry and the impeachment. The analogy between the function of the House in this matter and that of a grand jury was

[6] By Mr. Thomas Lowndes, of South Carolina, Annals, p. 825.
[7] By Mr. R. Griswold, of Connecticut, Annals, p. 837.
[8] By Mr. James Elliott, of Vermont, Annals, p. 846.
[9] By Mr. Thomas Griffin, of Virginia, Annals, p. 860.
[10] By Mr. Samuel W. Dana, of Connecticut, Annals, p. 870.
[11] By Mr. John Randolph, of Virginia, Annals, p. 811.
[12] By Mr. Smilie, of Pennsylvania, Annals, p. 821.
[13] By Messrs William Findley, of Pennsylvania, and Joseph H. Nicholson, of Maryland, Annals, pp. 826–838.
[14] By Mr. Nicholson, Annals, p. 844.
[15] By Mr. Samuel Thatcher, of Massachusetts, Annals, pp. 861, 862.

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correct and forcible. Before a grand jury it was the right of any individual to apply for and demand an inquiry into the conduct of any person within their cognizance, and it was more especially the right of any member of the jury to make such a demand. In addition to Mr. Smilie, another Member, Mr. John W. Eppes, of Virginia, stated [16] his belief that in his State a general opinion prevailed that Judge Chase had acted indecently and tyranically in a case tried there. Mr. Eppes said he was not personally present at the trial; but he related what he believed to be the facts as to the case. It was urged [17] that in England common report was considered sufficient authority for similar inquiries. In this case common report from Maine to Georgia condemned the conduct of the judge, not only in the case of Fries, but in the case of a grand jury in Delaware and in the case of Callender in Virginia. The general sentiment of the country condemned [18] the judge. Moreover, the Representatives of two States lately came forward and opposed his being assigned to circuits which embraced their States. This single fact ought to make an impression on the House. But in this case a Member in his place had impeached the judge, and it was not necessary to rely on common report. As to precedents for the proposed action, the impeachments of Strafford, Bolingbroke, Oxford, and Ormond, Eyres and Hastings were referred to in English history. From American history a case of proceedings against certain judges in North Carolina in 1796 was cited.[19]

In the course of the debate it was agreed by the House that Judge Richard Peters, who was associated in the case with Judge Chase, should be included in an inquiry, should one be made. This amendment was agreed to, yeas 79, nays 37.[20]

On January 7,[21] Mr. John Dennis, of Maryland, proposed an amendment to the resolution, by prefixing the following preamble:

> Whereas information has been given to the House by one of its Members, that, in a certain prosecution for treason on the part of the United States against a certain John Fries, pending in the circuit court of the United States in the State of Pennsylvania, Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, district judge for the district of Pennsylvania, by whom the said circuit court was then holden, did inform the counsel for the prisoner, that as the court had formed their opinion upon the point of law, and would direct the jury thereupon, the counsel for the prisoner must confine their argument before the jury to the question of fact only; and whereas it is represented that, in consequence of such determination of the court, the counsel did refuse to address the jury on the question of fact, and the said John Fries was found guilty of treason and sentenced by the court to the punishment in such case by the laws of the United States provided, and was pardoned by the President of the United States.

It was urged in behalf of this preamble that the Journal should show the grounds for the adoption of the resolution.

Mr. Joseph H. Nicholson, of Maryland, moved to amend the proposed preamble by striking out all after the word "whereas," where it first occurred, and inserting:

> Members of this House has stated in their places that they have heard certain acts of official misconduct alleged against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and Richard Peters, judge of the district court of the district of Pennsylvania.

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[16] Annals, p. 863.
[17] By Mr. William Findley, Annals, p. 834.
[18] Statement by Mr. Smilie, Annals, p. 823.
[19] By Mr. James Holland, of North Carolina, Annals, p. 848.
[20] House Journal, p. 518.
[21] House Journal, p. 520; Annals, p. 874.

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A division of the motion to strike out and insert was made,[22] and on striking out there appeared yeas 79, nays 41. Then the motion to insert was agreed to without division.

Mr. Randolph and others opposed the preamble, urging that it would tend to limit the general inquiry desired.

The question being taken on the preamble as amended, it was disagreed to without a division.

The original resolution, as it had previously been amended, was then agreed to [23] as follows, the yeas being 81, the nays 40:

Resolved, That a committee be appointed to inquire into the official conduct of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion whether the said Samuel Chase and Richard Peters, or either of them, have so acted, in their judicial capacity, as to require the interposition of the constitutional powers of this House.

Thereupon the committee was appointed as follows: Messrs. John Randolph, jr., of Virginia; Joseph H. Nicholson, of Maryland; Joseph Clay, of Pennsylvania; Peter Early, of Georgia; Roger Griswold, of Connecticut; Benjamin Huger, of South Carolina, and John Boyle, of Kentucky.[24]

On January 10,[25] the House passed a resolution that the committee "be authorized to send for persons and papers."

On January 30 [26] Mr. J. Randolph, in the name of the committee appointed to inquire into the conduct of Samuel Chase and Richard Peters, stated that documents had been received by them which occupied a considerable bulk, the printing of which would considerably assist their investigation, by rendering them more convenient for perusal. He added that it would probably be necessary to print these papers for the information of the House when the report of the committee was made. He therefore moved the vesting in them authority to cause to be printed such papers as they might conceive proper. It was objected that the printing of a part of the documents might prejudice the case in advance; but on the part of the committee it was replied that it was not necessary that the printed documents be made public until the report should be made. The motion of Mr. Randolph was then agreed to.

2343. Chase's impeachment, continued.

The report recommending the impeachment of Mr. Justice Chase was considered in Committee of the Whole House.

The investigation which resulted in the impeachment of Mr. Justice Chase was entirely ex parte.

The House found that Judge Richard Peters had not so acted as to require impeachment.

The impeachment of Mr. Justice Chase was carried to the Senate by a committee of two.

Form of declaration used by the committee in presenting the impeachment of Mr. Justice Chase in the Senate.

Verbal report made by the committee that had carried the impeachment of Mr. Justice Chase to the Senate.

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[22] The rule at present does not permit such a division.
[23] House Journal, pp. 522, 523; Annals, p. 875.
[24] It is to be observed that two of the seven members of this committee represented the minority, who had opposed the investigation.
[25] House Journal, p. 525.
[26] House Journal, p. 558; Annals, p. 959.

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Form of the resolution directing the carrying of the Chase impeachment to the Senate.

The committee appointed to prepare articles in the Chase case were all of those who had favored the impeachment.

The article of impeachment in the Chase case were reported just before the close of the first session of the Congress.

On March 6 [27] Mr. Randolph submitted the report of the committee; which was referred to a Committee of the Whole House. On March 8 [28] Mr. Randolph submitted to the House an additional affidavit, which was referred also to the Committee of the Whole House.

On March 12 [29] the report of the committee was taken up in Committee of the Whole House for consideration. This report was as follows:

That in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion—

1. That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

2. That Richard Peters, district judge of the district of Pennsylvania, has not so acted in his judiciary capacity as to require the interposition of the constitutional powers of this House.

Accompanying this report was a volume of printed testimony. Two members of the committee, Messrs. Huger and Griswold, did not concur in the report; but as it was not the practice in the House at that time to permit minority views, their dissent appears only from the debate. Mr. Huger declared [30] that the testimony on which it was proposed to proceed was "entirely ex parte." This was not denied. Mr. Huger based his opposition to the report on this ground.

The Committee of the Whole House, after considering the report, recommended the following:

Resolved, That Samuel Chase, esq., one of the associate justices of the Supreme Court of the United States, be impeached of high crimes and misdemeanors.

Resolved, That Richard Peters, district judge of the district of Pennsylvania, hath not so acted, in his judicial capacity, as to require the interposition of the constitutional power of this House.

The House agreed to the first resolution, yeas 73, nays 32. The second resolution was then agreed to without divisions.

Thereupon it was

Ordered, That Mr. John Randolph and Mr. Early be appointed a committee to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associated justices of the Supreme Court of the United States, of high crimes and misdemeanors; and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

Ordered, That the committee do demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On March 13,[31] in the Senate, a message from the House of Representatives, by Messrs. J. Randolph and Early, two of their Members, was received, as follows:

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[27] House Journal, p. 620; Annals, p. 1093.
[28] House Journal, p. 630; Annals, p. 1124.
[29] House Journal, p. 643; Annals, pp. 1171–1181.
[30] Annals, p. 1180.
[31] Senate Journal, p. 374; Annals, p. 271.

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Mr. President: We are ordered, in the name of the House of Representatives and of all the people of the United States, to impeach Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same.

We are also ordered to demand that the Senate take order for the appearance of the said Samuel Chase to answer to the said impeachment.

On the same day,[32] in the Senate, it was ordered that the message be referred to Messrs. Abraham Baldwin, of Georgia; Joseph Anderson, of Tennessee, and William C. Nicholas, of Virigina, "to consider and report thereon."

On March 13,[33] in the House, Mr. John Randolph, from the committee appointed on the 12th instant, reported—

That, in obedience to the order of the House, the committee had been to the Senate, and in the name of the House of Representatives, and of the people of the United States, had impeached Samuel Chase, one of the associate justices of the Supreme Court of the United States, of high crimes and misdemeanors; and had acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him and make good the same.

And further: That the committee had demanded that the Senate take order for the appearance of the said Samuel Chase to answer the said impeachment.

On motion it was—

Resolved, That a committee be appointed to prepare and report articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, who has been impeached by this House, during the present session, of high crimes and misdemeanors; and that the said committee have power to send for persons, papers, and records.

Ordered, That Mr. John Randolph, Mr. Nicholson, Mr. Joseph Clay, Mr. Early, and Mr. Boyle be appointed a committee, pursuant to the said resolution.

All of this committee had favored the report in favor of impeachment.

On March 26[34] Mr. Randolph reported articles of impeachment, which were ordered printed. These articles do not appear in the Journal of the House.

Then, on March 27,[35] the Congress adjourned to the first Monday in November next.

2344. Chase's impeachment continued.

The proceedings in the Chase impeachment were continued after a recess of Congress; but in deference to the practice at that time the articles were recommitted for a new report.

The articles impeaching Mr. Justice Chase were considered article by article in Committee of the Whole.

Practice in considering and amending articles of impeachment in Committee of the Whole.

The House decided to retain in the articles of the Chase impeachment the old reservation of liberty to exhibit further articles.

The articles of impeachment in the Chase case appear in the House Journal in full at the time of their adoption.

Method by which the House amended and voted on the articles of impeachment in the Chase case.

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[32] Senate Journal, p. 375; Annals, p. 374.
[33] House Journal, p. 645; Annals, p. 1182.
[34] House Journal, pp. 689, 690; Annals, pp. 1237–1240.
[35] House Journal, p. 696.

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On the second day of the next session, November 6,[36] Mr. Randolph raised a question as to the status of the articles of impeachment, it being then the practice of the House that pending business should begin anew at the first of a session.[37] As a result of this inquiry the report made at the last session was referred to a select committee, composed of the same members as the select committee of the preceding session, except that Mr. John Rhea, of Tennessee, succeeded Mr. Nicholson.

On November 30,[38] Mr. Randolph, from the select committee, reported articles of impeachment, which were nearly the same as those reported at the last session, with the addition of two new articles. The articles were referred to a Committee of the Whole House. An objection was made that the committee reporting in this case had been given no power of investigation, and yet that they had reported new articles not reported by the former committee, which had expired. This objection was not considered by the House.

On December 3,[39] the report was considered in Committee of the Whole House. The articles having been read, a question arose as to procedure, especially as to amendment; and the Chairman[40] gave it as his opinion that the proper method would be to take up the report by articles. This was done accordingly.

The first article being read, a motion was made to strike it out, whereupon the Chairman, with the approval of the committee so far as expressed, decided that, while the motion to strike out the first section of a bill would be in order, yet it seemed to him that in considering independent articles it would be preferable to take the sense of the Committee of the Whole on each article on a motion to concur with the action of the select committee which had reported the articles. This method was thereupon adopted.

Thereupon the Comittee of the Whole House went through the report article by article, amending, and where an article had several paragraphs, reading by paragraphs for amendment. And on each article, after an opportunity for amendment and after reading of testimony relating to it on demand of a Member, the question was put on concurring.[41] The committee decided, ayes 40, noes 50, that the testimony should not be read as a whole on each article, but only as called for by Members.

When the last article was read, Mr. James Mott, of New Jersey, moved[42] to strike out the words, declaring that the House "saved to itself the liberty of exhibiting at any time hereafter any further articles, or other accusation or impeachment against the said Samuel Chase," and further, that part which saved to the House "the right of replying to any such articles of impeachment or accusation which shall be exhibited to them." It seemed to him unfair that the House should reserve such a right to themselves. If there was anything more with which he ought to be charged, it ought to be now brought forward, and the accused should be informed at once how far they meant to go, in order to enable him the better to make his defense.

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[36] Second session Eighth Congress, House Journal, p. 6; Annals, p. 680.
[37] The rule in this respect was modified in 1818.
[38] House Journal, p. 29; Annals, pp. 726–731.
[39] Annals, p. 728.
[40] Joseph B. Varnum, of Massachusetts, Chairman.
[41] Annals, pp. 731–746.
[42] Annals, p. 743.

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Mr. Randolph argued that these reservations had been made in the articles of the Blount and Pickering impeachments, and he did not wish to see the liberties of the people or the rights of the House abridged. Mr. Mott admitted the practice, which had been followed in his own State.

Mr. Mott's motion was disagreed to.

The last article having been concurred in, the Committee of the Whole House rose and reported the articles with amendments.

On December 4,[43] the articles were considered in the House, the Journal containing them in full as reported originally by the select committee. Each article was considered by itself, and after opportunity to amend the question was taken "that the House do agree" to the article. On the last article a division was demanded, as it contained both a charge against Judge Chase and the protestation whereby the House reserved to themselves the "liberty of exhibiting at any time hereafter any further articles." The first portion of the article was agreed to, and then the question being taken on the second portion, it was agreed to, yeas 78, nays 32. The other votes on agreeing to the several articles had ranged as follows: yeas 70 to 84, nays 34 to 45. All amendments made in Committee of the Whole had been disagreed to, and no new ones were agreed to by the House.

The question having been taken on each article, the House then voted affirmatively on the question—

That the House do concur with the select committee in their agreement to the said articles of impeachment, as originally proposed, and hereinbefore recited.

2345. Chase's impeachment continued.

The House appointed seven managers, by ballot, for the trial of Mr. Justice Chase.

The managers chosen for the trial of Mr. Justice Chase had each voted for a portion, at least, of the articles.

The House overruled the Speaker and decided that a manager of an impeachment should be elected by a majority and not by a plurality.

Forms of resolutions directing the managers to exhibit in the Senate the articles of impeachment against Mr. Justice Chase.

In the Chase impeachment the message notifying the Senate that articles would be exhibited does not appear to have included the names of the managers.

The Senate notified the House of the day and hour when it would receive the managers to exhibit the articles impeaching Mr. Justice Chase.

The Senate as a court adopted a rule prescribing the ceremonies at the presentation of articles impeaching Mr. Justice Chase.

On December 5,[44] it was—

Resolved, That seven managers be appointed by ballot, to conduct the impeachment exhibited against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Thereupon the following were elected: Messrs. John Randolph, jr., of Virginia; Cæsar A. Rodney, of Delaware; Joseph H. Nichol-

[43] House Journal, pp. 31–44; Annals, pp. 747–762.
[44] House Journal, p. 44; Annals, pp. 762, 763.

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son, of Maryland; Peter Early, of Georgia; John Boyle, of Kentucky; Roger Nelson, of Maryland, and George W. Campbell, of Tennessee.

Each of these managers had voted for a portion or all of the articles of impeachment.

On the first ballot the six first Members on the list had each a majority of the ballots; but Mr. Campbell had only a plurality.

A question arising, the Speaker,[45] after referring to the rule of the House, "In all other cases of ballot than for committees, a majority of the votes given shall be necessary to an election," held that Mr. Campbell was duly chosen.

A question arose, and after reference to precedents, which did not seem conclusive, Mr. Randolph appealed from the decision. And the question being taken, the decision of the Speaker was overruled, ayes 25, noes 50. Thereupon a second ballot was taken, at which Mr. Campbell received a majority.

Thereupon, on motion of Mr. Nicholson, it was—

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of the people of the United States, against Samuel Chase, in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the said impeachment.

Ordered, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against the said Samuel Chase; and that the Clerk of this House do go with the said message.

On December 6 [46] in the Senate the Clerk of the House delivered the message as follows:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed managers to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against the said Samuel Chase.

On December 7 [47] Mr. William B. Giles, of Virginia, from a committee appointed on November 30 "to prepare and report proper rules of proceeding to be observed by the Senate in cases of impeachment," made a report, which was read. With Mr. Giles on this committee were Messrs. Abraham Baldwin, of Georgia, John Breckenridge, of Kentucky, David Stone, of North Carolina, and Israel Smith, of Vermont.

Also on December 7 [48] it was—

Resolved, That the Senate will, at 1 o'clock this day, be ready to receive articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, to be presented by the managers appointed by the House of Representatives.

Ordered, That the Secretary notify the House of Representatives accordingly.

Immediately thereafter, in the high court of impeachment,[49] it was—

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[45] Nathaniel Macon, of North Carolina, Speaker.
[46] Senate Journal, p. 421.
[47] Senate Journal, p. 422.
[48] Senate Journal, p. 422; Annals, p. 21.
[49] Journal of High Court of Impeachment, Senate Journal, pp. 509, 510.

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Resolved, That when the managers of the impeachment shall be introduced to the bar of the Senate and shall have signified that they are ready to exhibit articles of impeachment against Samuel Chase, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States." After which the articles shall be exhibited; and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.[50]

2346. Chase's impeachment continued.

The articles of impeachment of Mr. Justice Chase.

Ceremonies at the presentation of the articles before the high court of impeachment in the Chase case.

In presenting to the court the articles impeaching Mr. Justice Chase, the chairman of the managers read them and then delivered them at the table.

The managers having carried to the Senate the articles impeaching Mr. Justice Chase, reported verbally to the House.

On the same day the message from the Senate announcing its readiness to receive the articles of impeachment was received in the House [51] and the managers repaired at 1 o'clock to the Senate Chamber. They were admitted,[52] and Mr. Randolph, the chairman, announced that they were—

the managers instructed by the House of Representatives to exhibit certain articles of impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

The managers were requested by the President to take seats assigned them within the bar, and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyes! Oyes! Oyes!

All persons are commanded to keep silence, etc. [In words as prescribed by the resolution.]

After the proclamation the managers rose, and Mr. Randolph, their chairman, read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ART. 1. That unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with treason, before the circuit court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz:

1. In delivering an opinion in writing, on the question of law, on the construction of which the defense of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defense;

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[50] This is the exact form of resolution adopted on January 4, 1804, for the presentation of the articles of impeachment against Judge John Pickering. Senate Journal, Eighth Congress, pp. 494, 495.

[51] House Journal, p. 47; Annals, p. 89.

[52] Senate Impeachment Journal, pp. 509, 510.

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2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defense of their client;

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.

In consequence of which irregular conduct of the said Samuel Chase, as dangerous to our liberties as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the Constitution, and was condemned to death without having been heard by counsel, in his defense, to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the right of juries, on which ultimately rest the liberty and safety of the American people.

ART. 2. That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, 1800, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then President of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the trial, because he had made up his mind as to the publication from which the words, charged to be libelous in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the said jury, by whose verdict the prisoner was subsequently convicted.

ART. 3. That with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretense that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

ART. 4. That the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, viz:

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above-named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed stating the absence of material witnesses on behalf of the accused; and although it was manifest that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term.

3. In the use of unusual, rude, and contemptuous expressions toward the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law to which the conduct of the judge did at the same time manifestly tend.

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment.

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice.

ART. 5. And whereas it is provided by the act of Congress passed on the 24th day of September, 1786, entitled "An act to establish the judicial courts of the United States," that for any crime or offense against the United States the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the State where such offender may be found; and whereas it is provided by the laws of Virginia that upon presentment by any grand jury of an offense not capital the court shall order the clerk to issue a summons against the person or persons offending to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a capias against the body of the said James Thomson Callender, indicted for an offense not capital, whereupon the said Callender was arrested and committed to close custody, contrary to law in that case made and provided.

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ART. 6. And whereas it is provided by the thirty-fourth section of the aforesaid act, entitled "An act to establish the judicial courts of the United States," that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States in cases where they apply; and whereas by the laws of Virginia it is provided that in cases not capital the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall have been made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided.

ART. 7. That at a circuit court of the United States for the district of Delaware, held at Newcastle, in the month of June, 1800, whereat the said Samuel Chase presided, the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared through their foreman that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the State of Delaware among a certain class of people, particularly in Newcastle County, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was"—but checking himself, as if sensible of the indecorum which he was committing, added "that it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to inquire diligently into this matter," or words to that effect; and that with intention to procure the prosecution of the printer in question the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser"), and, by a strict examination of them, to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper, thereby degrading his high judicial functions and tending to impair the public confidence in and respect for the tribunals of justice so essential to the general welfare.

ART. 8. And whereas mutual respect and confidence between the Government of the United States and those of the individual States, and between the people and those governments, respectively, are highly conducive to that public harmony without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court for the district of Maryland, held at Baltimore in the month of May, 1803, pervert his official right and duty to address the grand jury then and there assembled on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury and of the good people of Maryland against their State government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and, moreover, that the said Samuel Chase then and there, under pretense of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury and of the good people of Maryland against the Government of the United States by delivering opinions which, even if the judicial authority were competent to their expression on a suitable occasion and in a proper manner, were at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partisan.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusation or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every the aforesaid articles, and to all and every other articles, impeachment, or accusation, which shall be exhibited by them as

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the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as are agreeable to law and justice.

After the reading of the articles [52] the President notified the managers that the Senate would take proper order on the subject of the impeachment, of which due notice should be given to the House of Representatives.

The managers delivered the articles of impeachment at the table and withdrew.

Thereupon the high court of impeachments adjourned.

The managers having returned to the House, Mr. Randolph, their chairman, reported [53] that they did this day carry to the Senate the articles of impeachment agreed to by this House on the 4th instant, and that the said managers were informed by the Senate that their House would take proper measures relative to the said impeachment, of which this House should be duly notified.

2347. Chase's impeachment continued.

Form prescribed for the writ of summons in the Chase impeachment.

Form of precept to be indorsed on the writ of summons in the Chase impeachment.

The Senate having fixed a day for the return of the writ of summons in the Chase impeachment, informed the House thereof.

On December 10 [54] the high court of impeachments considered the report of the committee appointed November 30 to prepare and report proper rules of proceedings, and after consideration agreed to the following:

A summons shall issue, directed to the person impeached, in the form following: "THE UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States to ———, greeting:

"Whereas, the House of Representatives of the United States of America did, on the ——, ——— day of ———, exhibit to the Senate articles of impeachment against you, the said ———, in the words following, viz: [here recite the articles] and did demand that you, the said ——— ——— should be put to answer the accusations as set forth in said articles; and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice: You, the said ——— ———, are therefore hereby summoned, to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the —— day of ———, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders and judgments as the Senate of the United States shall make in the premises, according to the Constitution and laws of the United States. Hereof you are not to fail.

"Witness, ——— ———, Vice President of the United States of America and President of the Senate thereof, at the city of Washington, this —— day of ———, in the year our Lord —— and of the Independence of the United States the ———."

Which summons shall be signed by the Secretary of the Senate, and sealed with their seal, and served by the Sergeant-at-Arms to the Senate, or by such other person as the Senate shall specially appoint for that purpose, who shall serve the same, pursuant to the directions given in the form next following:

A precept shall be indorsed on said writ of summons, in the form following, viz:

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[52] The articles are not given in the Senate Journal (p. 510) on the day of their presentation, so the signatures of the Speaker and Clerk do not appear.

[53] House Journal, p. 47.

[54] Senate Impeachment Journal, pp. 510, 511; Annals, pp. 89, 90.

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"UNITED STATES OF AMERICA, *ss:*

"The Senate of the United States to ———, ———, greeting:

"You are hereby commanded to deliver to, and leave with ——— ———, if to be found, a true and attested copy of the within writ of summons, together with a like copy of this precept, showing him both; or in case he can not with convenience be found, you are to leave true and attested copies of the said summons and precept at his usual place of residence, and in whichever way you perform the service let it be done at least ——— days before the appearance day mentioned in said writ of summons. Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in said writ of summons.

"Witness, ——— ———, Vice-President of the United States of American and President of the Senate thereof, at the city of Washington, this —— day of———, in the year of our Lord —— and of the Independence of the United States the ———."

Which precept shall be signed by the Secretary of the Senate and sealed with their seal.

It was then

Resolved, That the secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment, exhibited against him by the House of Representatives on Friday last; that the said summons be returnable the second of January next and be served at least fifteen days before the return day thereof.

Ordered, That the secretary notify the House of Representatives of this resolution.

On the same day the message was delivered in the House,[55] and on the succeeding day was read, in form as follows:

In Senate of the United States—High Court of Impeachments, Monday, December 10, 1804.

The United States *v.* Samuel Chase.

Resolved, That the Secretary be directed to issue a summons to Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to answer certain articles of impeachment exhibited against him by the House of Representatives, on Friday last. That the said summons be returnable the second day of Janauary next and be served at least fifteen days before the return day thereof.

Ordered, That the Secretary carry this resolution to the House of Representatives.

Attest:

SAM. A. OTIS, *Secretary.*

Ordered, That the said proceedings of the Senate do lie on the table.

On December 14,[56] in the High Court of Impeachment, "Return was made by the Sergeant-at-Arms on the summons issued."

2348. Chase's impeachment continued.

The rules agreed to by the high court of impeachment to govern the trial of Mr. Justice Chase.

On December 24,[57] the High Court of Impeachments concluded its consideration of the report of the committee and the rules stood as follows:

1. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person, and are directed to carry such articles to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to the said notice.

2. When the managers of an impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of

[55] House Journal, pp. 49, 50, Annals, p. 701.
[56] Senate Impeachment Journal, p. 511.
[57] Senate Impeachment Journal, pp. 511–513, Annals, pp. 89–92.

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impeachment against any person, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against ——— ———;" after which the articles shall be exhibited, and then the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

3 and 4. [As adopted on December 10—Forms of summons and precept.]

5. Subpoenas shall be issued by the Secretary of the Senate, upon the application of the managers of the impeachment, or of the party impeached, or his counsel, in the following form, to wit:

"To ——— ———, greeting:

"You, and each of you, are hereby commanded to appear before the Senate of the United States, on the —— day of ——, at the Senate Chamber, in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———. Fail not.

"Witness, ——— ———, Vice-President of the United States of America and President of the Senate thereof, at the city of Washington, this —— day of ——, in the year of our Lord —— and of the Independence of the United States the ——."

Which shall be signed by the Secretary of the Senate and sealed with their seal.

Which subpoenas shall be directed, in every case, to the marshal of the district where such witnesses respectively reside, to serve and return.

6. The form of direction to the marshal, for the service of the subpoena, shall be as follows:

"The Senate of the United States of America to the Marshal of the District ——————— of ——.

"You are hereby commanded to serve and return the within subpoena, according to law.

"Dated at Washington, this —— day of ——, in the year of our Lord —— and of the Independence of the United States the ———.

——— ———,

"Secretary of the Senate."

7. That the President of the Senate shall direct all necessary preparations in the Senate Chamber, and all the forms of proceeding, while the Senate are sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for by the Senate.

8. He shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial, to discharge such duties as may be prescribed by him.

9. At 12 o'clock of the day appointed for the return of the summons against the person impeached the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer, in the form following, viz: "I, ——— ———, do solemnly swear that the return made and subscribed by me, upon the process issued on the —— day of ———, by the Senate of the United States against ——— ———, is truly made, and that I have performed said services as therein described. So help me God." Which oath shall be entered at large on the records.

10. The person impeached shall then be called to appear and answer the articles of impeachment exhibited against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself or if by agent or attorney, naming the person appearing and the capacity in which he appears.

11. At 12 o'clock of the day appointed for the trial of an impeachment the legislative and executive business of the Senate shall be postponed. The Secretary shall then administer the following oath or affirmation to the President:

"You solemnly swear, or affirm, that in all things appertaining to the trial of the impeachment of ——— ———, you will do impartial justice according to the Constitution and laws of the United States."

12. And the President shall administer the said oath or affirmation to each Senator present.

The Secretary shall then give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of ——— ———, in the

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Senate Chamber, which Chamber is prepared with accommodations for the reception of the House of Representatives.

13. Counsel for the parties shall be admitted to appear, and be heard upon an impeachment.

14. All motions made by the parties or their counsel shall be addressed to the President of the Senate, and if he shall require it, shall be committed to writing, and read at the Secretary's table and all decisions shall be had by yeas and nays, and without debate, which shall be entered on the records.

15. Witnesses shall be sworn in the following form, to wit: "You, ——— ———, do swear (or affirm, as the case may be) that the evidence you shall give in the case now depending between the United States and ——— ———, shall be the truth, the whole truth, and nothing but the truth. So help you God." Which oath shall be administered by the Secretary.

16. Witnesses shall be examined by the party producing them, and then cross-examined in the usual form.

17. If a Senator is called as a witness, he shall be sworn, and give his testimony, standing in his place.

18. If a Senator wishes a question to be put to a witness, it shall be reduced to writing and put by the President.

19. At all times, whilst the Senate is sitting upon the trial of an impeachment the doors of the Senate Chamber shall be kept open.

The nineteenth rule was agreed to on December 31.[58]

2349. Chase's impeachment continued.

Form of return made and oath taken by the Sergeant-at-Arms in the Chase impeachment.

Mr. Justice Chase appeared to answer the articles of impeachment "in his own proper person."

On his appearance to answer articles of impeachment Mr. Justice Chase was furnished with a chair.

Mr. Justice Chase, in appearing, was permitted by the Vice-President, without objection of the Senate, to read a paper giving reasons for delaying his answer.

Mr. Justice Chase, in asking time to prepare his answer to the articles, was called to order by the Vice-President for expressions used.

It was decided that members of the court should be sworn before considering respondent's motion for time to answer in the Chase case.

Mr. Justice Chase's application for a time to answer was accompanied by a sworn statement of reasons.

The Senate having fixed the day for Mr. Justice Chase to file his answer, informed the House that the trial would proceed on that day.

Neither the managers nor the House attended on the appearance of Mr. Justice Chase in answer to the summons.

On January 2, 1805,[59] the high court of impeachment having been opened by proclamation, the return made by the Sergeant-at-Arms was read, as follows:

I, James Mathers, Sergeant-at-Arms to the Senate of the United States, in obedience to the within summons to me directed, did proceed to the residence of the within-named Samuel Chase, on the 12th day of December, 1804, and did then and there leave a true copy of the said writ of summons, together with a true copy of the articles of impeachment annexed, with him, the said Samuel Chase.

JAMES MATHERS.

[58] Senate impeachment, Journal, pp. 513, 514.
[59] Senate impeachment, Journal, p. 514.

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After which the Secretary administered to him the oath, as follows:

You, James Mathers, Sergeant-at-Arms to the Senate of the United States, do solemnly swear that the return made and subscribed by you upon the process issued on the 10th day of December last, by the Senate of the United States, against Samuel Chase, one of the Associate Justices of the Supreme Court, is truly made, and that you have performed said services as therein described. So help you God.

Samuel Chase was then solemnly called,[60] who appeared "in his own proper person."

The President of the Senate[61] informed him that the Senate was ready to receive any answer that he had to make.[62]

Mr. Chase requested the indulgence of a chair, which was immediately furnished. The report of the trial intimates that in accordance with the parliamentary practice of England no chair was assigned to him previously to his appearance, but that an informal intimation was made to him that, on his request, it would be furnished.

After being seated for a short time Judge Chase rose and commenced reading from a paper which he held in his hand.

After reading far enough to show that the paper was proceeding in general denial of the charges, the President reminded him that this was the day appointed to receive any answer he might make to the articles of impeachment. Thereupon Judge Chase said it was his purpose to request the allowance of further time to put in his answer.

The reading was then proceeding, when the President interrupted and asked if the paper was intended as his answer. If so, it would be put on file. If it was a prelude to a motion he meant to make praying to be allowed further time for putting in his answer, he would confine himself strictly to what had relation to that object.

Judge Chase said it was not his answer that he was reading, but that he was assigning reasons why he could not now answer, in order to show that he was entitled to further time to prepare and put in his answer.

The President replied:

You, who are so conversant in the practice of courts of law, know very well that a motion for time must not be founded on mere suggestions, but must be founded on some facts to prove the propriety of the motion.

Judge Chase said he meant to show the impracticability of his answering at this time, from the articles themselves, and it was for that purpose that he made an allusion to them.

The President said that with the caution he had given he might proceed, provided no objection were made by any gentleman of the Senate.

Judge Chase proceeded in his address.

Later in the reading the following paragraph occurred:

And acrimonious as are the terms in which many of the accusations are conceived; harsh and opprobrious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were "*puling in their nurses' arms*" *whilst I was contributing my utmost aid to lay the*

[60] The form of this call is not given, but in the Blount tria lit was as follows: "Hear ye! Hear ye! Hear ye! William Blount, late a Senator from the State of Tennessee, come forward and answer the articles of impeachment against you by the House of Representatives." Senate Journals, Sixth, Seventh, and Eighth Congresses, p. 486.

[61] Aaron Burr, of New York, Vice-President, and President of the Senate.

[62] Annals, pp. 92–98.

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groundwork of American liberty, I yet thank my accusers, whose functions as members of the Government of my country I highly respect, for having at length put their charges into a definitive form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honorable court, of my country, and of the world.

On using the expressions marked in *italics*,

The President interrupted Judge Chase and said that observations of censure or recrimination were not admissible; it would be very improper for him to listen to observations on the statements of the House of Representatives before an answer was filed.

Judge Chase said he had very few words more to add, which would conclude what he had to say at the present time.

With the permission of the President he proceeded.

The address being concluded, the President requested him to reduce to writing any motion which he wished to make.

Thereupon Judge Chase submitted the following:

I solicit this honorable court to allow me until the first day of the next session to put in my answer and prepare for my trial.

The President informed Mr. Chase that the court would take time to consider the motion.

During these proceedings incident to the return on the summons and the appearance of Judge Chase, neither the House of Representatives nor its manageres were present.

After Judge Chase had submitted his motion the Senate withdrew to a private apartment, where debate arose as to whether or not the Senators should take the oath required by the Constitution before they took into consideration the motion of Judge Chase; and at the conclusion of the debate it was

Resolved, That on the meeting of the Senate to-morrow, before they proceed to any business on the articles of impeachment before them, and before the decision of any question, the oath prescribed by the rules shall be administered to the President and Members of the Senate.

On January 3 [63] the high court of impeachments was duly opened with proclamation, and the oath was administered to the President and Senators in the manner prescribed by the rule.

Thereupon the President stated that he had received a letter from the defendant, inclosing an affidavit that further time was necessary for him to prepare for trial; which affidavit [64] was read, as follows:

City of Washington, ss:

Samuel Chase made oath on the Holy Evangels of Almighty God, that it is not in his power to obtain information respecting the facts alleged in the articles of impeachment to have taken place in the city of Philadelphia in the trial of John Fries; or of the facts alleged to have taken place in the city of Richmond in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the the 5th day of March next. And, further, that it is not in his power to procure information of the names of the witnesses, whom he thinks it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the finishing of the said trial, before the said 5th day of March next; and the said Samuel Chase further made oath that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress; and that he verily believes, if he had at this time full

[63] Senate impeachment, Journal, pp. 514, 515; Annals, pp. 98–100.
[64] This affidavit does not appear in full in the Journal of the high court of impeachments.

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information of facts, and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not prepare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And, further, this his application to the honorable the Senate, for time to obtain the information of facts, in order to prepare his answer, and for time to procure the attendance of necessary witnesses, and to prepare for his defense in the trial, and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him in their real merits.

SAMUEL CHASE.

Sworn to this 3d day of January, 1805, before

SAMUEL HAMILTON.

Whereupon the following motion was made by Mr. Stephen R. Bradley, of Vermont:

Ordered, That Samuel Chase file his answer, with the Secretary of the Senate, to the several articles of impeachment exhibited against him, by the House of Representatives, on or before the —— day ——.

A motion was made by Mr. William B. Giles, of Virginia, to amend the motion and to strike out all that follows the word "*Ordered*," and insert "That ——— next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase.

The motion to strike out was agreed to, yeas 20, nays 10. And then the motion to insert was also agreed to, yeas 22, nays 8.

The motion to fill the blank with the words "first Monday of December next" was disagreed to, yeas 12, nays 18. Then a motion to insert "the fourth day of February next" was agreed to, yeas 22, nays 8. Then the resolution as amended was agreed to, yeas 21, nays 9.

It was then

Ordered, That the Secretary notify the House of Representatives and the said Samuel Chase thereof.

Thereupon the high court of impeachments adjourned.

On January 4[65] the House was informed by message, which was read in form, as follows:

In Senate of the United States—High court of impeachments, January 3, 1805.

United States *v.* Samuel Chase.

Ordered, That the 4th day of February next shall be the day for receiving the answer, and proceeding on the trial of the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

Attest: SAM. A. OTIS, *Secretary*.

Ordered, That the said proceedings of the Senate do lie on the table.

2350. Chase's impeachment continued.

A manager of the Chase impeachment being excused, the House chose another by ballot and informed the Senate thereof.

The House determined to attend as a Committee of the Whole the proceedings of the trial of Mr. Justice Chase.

On January 25,[66] in the House—

Resolved, That Mr. Nelson be excused from serving as one of the Managers appointed on the 5th ultimo, on the part of this House, to conduct the impeachment against Samuel Chase, one of the Associate Justices of the Supreme Court of the United States.

[65] House Journal, p. 78; Annals, p. 872.
[66] House Journal, p. 105; Annals, p. 1011.

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On January 28 [67] the House elected by ballot Mr. Christopher Clark, of Virginia, to succeed Mr. Nelson, and informed the Senate thereof by message, delivered as follows by the Clerk:

Mr. President, I am directed to acquaint the Senate that the House of Representatives have elected Mr. Clark a manager to conduct the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States, in the place of Mr. Nelson, who hath been excused that service.

Mr. Clark had voted in favor of all the articles of impeachment save one, which he had voted against.

On February 4,[68] in the House, it was

Resolved, That during the trial of the impeachment now depending before the Senate, this House will attend, at 10 o'clock in the forenoon, and proceed on the legislative business before the House until the hour at which the Senate shall appoint each day to proceed on the trial of the impeachment now pending before that body, and that the House then resolve itself into a Committee of the Whole and attend the said trial.

2351. Chase's impeachment continued.

Attendance of the House in Committee of the Whole at the ceremonies of the beginning of Chase's trial.

Description of the arrangement of the Senate chamber for the Chase trial.

Mr. Justice Chase introduced his counsel at the time he gave in his answer.

The Senate granted the request of Mr. Justice Chase for permission to read his answer by himself and counsel.

The answer of Mr. Justice Chase to the articles of impeachment.

The answer of the respondent in the Chase trial does not appear in the journal of the court.

On request of the managers the Senate directed its Secretary to carry to the House an attested copy of Mr. Justice Chase's answer.

The answer of Mr. Justice Chase being received in the House was referred to the managers.

Form of proceedings when the House attends an impeachment trial as Committee of the Whole.

On the same day,[69] the high court of impeachments was duly opened with proclamation, and it was then—

Ordered, That the Secretary give notice to the House of Representatives that the Senate are in their public Chamber and are ready to proceed on the trial of Samuel Chase; and that seats are provided for the accommodation of the Members.

This message being received in the House,[70] that body resolved itself into a Committee of the Whole House, with Mr. Joseph B. Varnum, of Massachusetts, as Chairman, and proceeded to the Senate Chamber with the managers. Soon after they entered the Chamber and took their seats.

The Senate Chamber was fitted up in a style of appropriate elegance. Benches covered with crimson, on each side, and in a line with the chair of the President, were assigned to the Members of the Senate. On the right and in front of the chair, a box was assigned to the

[67] House Journal, p. 108; Senate Journal, pp. 442, 516.
[68] House Journal, p. 118; Annals, p. 1174.
[69] Senate Impeachment Journal, p. 516; Annals, p. 101.
[70] House Journal, p. 119.

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managers, and on the left a similar box to Mr. Chase and his counsel, and chairs allotted to such friends as he might introduce. The residue of the floor was occupied with chairs for the accommodation of the Members of the House of Representatives, and with boxes for the reception of the foreign ministers, and civil and military officers of the United States. On the right and left of the Chair, at the termination of the benches of the members of the court, boxes were assigned to stenographers. The permanent gallery was allotted to the indiscriminate admission of spectators. Below this gallery and above the floor of the House a new gallery was raised and fitted up with peculiar elegance, intended primarily for the exclusive accommodation of ladies. But this feature of the arrangement, made by the Vice-President, was at an early period of the trial abandoned, it having been found impracticable. At the termination of this gallery, on each side, boxes were specially assigned to ladies attached to the families of public personages. The preservation of order was devolved on the marshal of the District of Columbia, who was assisted by a number of deputies.[71]

Samuel Chase being called to make answer to the articles of impeachment exhibited against him by the House of Representatives, appeared and requested that Robert G. Harper, Luther Martin, Philip B. Key, and Joseph Hopkinson, esqs., might be admitted and considered as counsel for him, the said Samuel Chase, and thereupon submitted a motion, which was read at the table as follows:

Samuel Chase moves for permission to read his answer, by himself and his counsel, at the bar of the honorable court.

The President asked him if it was the answer on which he meant to rely? To which he replied in the affirmative.

The question being taken on the motion, it passed in the affirmative.

Then Judge Chase began the reading of his answer, and before its conclusion was assisted by Messrs. Harper and Hopkinson. The answer began as follows:[72]

This respondent, in his proper person, comes into the said court, and protesting that there is no high crime or misdemeanor particularly alleged in the said articles of impeachment to which he is or can be bound by law to make answer, and saving to himself now, and at all times hereafter, all benefit of exception to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law or otherwise, and protesting also that he ought not to be injured in any manner, by any words, or by any want of form in this his answer, he submits the following facts and observations by way of answer to the said articles.

The answer then proceeds to answer the charges, article by article.

At the conclusion of the reading, Mr. Randolph, chairman of the managers, moved that they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer.

To this the President replied that the motion would be taken into consideration and the House of Representatives should be notified of the result.

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[71] Annals, p. 100.

[72] Annals, pp. 101–150. The Journal of the Court of Impeachments does not have the answer; and prints the articles only as they are voted on.

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Thereupon the high court of impeachments adjourned and the Members of the House of Representatives returned to their Hall, and the Committee of the Whole House rose and their Chairman reported.[73]

On February 5,[74] in the high court of impeachments—

Ordered, That the Secretary carry to the House of Representatives an attested copy of the answer of Samuel Chase, one of the associate justices of the Supreme Court, to articles of impeachment against him by the House of Representatives.

The message being delivered in the House the same day,[75] the copy of the answer was read and ordered to be referred to the managers.

2352. Chase's impeachment continued.

The replication of the House to the answer of Mr. Justice Chase to the articles of impeachment.

In the Chase case the House refused to strike from its replication certain words reflecting on the motives of the respondent.

Forms of resolutions relating to the adoption of the replication in the Chase case and the carrying thereof to the Senate.

The replication in the Chase impeachment was signed by the Speaker and attested by the Clerk.

The replication in the Chase case was read to the Senate by the chairman of the managers.

Counsel for respondent were furnished a copy of the House's replication by direction of the Presiding Officer.

Later, on the same day, Mr. Randolph, chairman of the managers, submitted to the House the following report:

That they have considered the said answer, and do find that the said Samuel Chase has endeavored to cover the crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; and that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said article; and do submit to the judgment of the House their opinion, that, for avoiding any imputation of delay to the House of Representatives, in a case of so great moment, a replication be forthwith sent to the Senate, maintaining the charge of this House; and that the committee had prepared a replication accordingly, which they herewith report to the House, as follows:

"The House of Representatives of the United States have considered the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States; and observe—

"That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts; that the answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice of which he stands accused; and the House of Representatives, in

[73] The Journal of the House has the following entry, showing the form used while the trial progressed:

"The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber to attend the trial by the Senate of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States; and, after some time spent therein, the committee returned into the Chamber of the House, and Mr. Speaker having resumed the chair, Mr. Varnum, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment, and that some progress had been made therein." (House Journal, p. 119.)

[74] Senate Impeachment Journal, p. 516.

[75] House Journal, pp. 123, 124; Annals, pp. 1181–1184.

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full confidence of the truth and justice of their accusation and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives, and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true; and that the said Samuel Chase is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose."

Mr. Roger Griswold, of Connecticut, moved that the report be committed to a Committee of the Whole House, which motion was disagreed to.

Mr. John Dennis, of Maryland, moved to amend the replication by striking out therefrom after the words "and observe," the following words:

That the said Samuel Chase has endeavored to cover the high crimes and misdemeanors laid to his charge by evasive insinuations and misrepresentation of facts: that the said answer does give a gloss and coloring, utterly false and untrue, to the various criminal matters contained in the said articles.

This amendment was disagreed to, yeas 41, nays 70.

Then the question being taken that the House do agree to the said replication, it passed in the affirmative, yeas 77, nays 34.

Thereupon, it was

Resolved, That the replication annexed to the report of the managers be put into the answer and pleas of the aforesaid Samuel Chase, on behalf of this House; and that the managers be instructed to proceed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Ordered, That a message be sent to the Senate to inform them that this House have agreed to a replication, on their part, to the answer of Samuel Chase, one of the associate justices of the Supreme Court of the United States, to the articles of impeachment exhibited to the Senate against him by this House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate; and to proceed to maintain the same at the bar of the Senate, at such time as shall be appointed by the Senate.

On February 7, 1805,[76] in the high court of impeachments, the Clerk of the House delivered the message, as above directed.

Then it was

Ordered, That the Secretary inform the House of Representatives that the Senate will be ready to proceed on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court, at half past 2 o'clock this day.

The high court of impeachments being duly opened at 2 o'clock the managers attended, and the replication was read by Mr. Randolph, in the form given above, with the following attestation:

Signed by order and in behalf of the said House.

NATH. MACON, *Speaker*.

Attest:
JOHN BECKLEY, *Clerk*.

Mr. Hopkinson requested a copy of the replication, which the President replied, would be furnished by the Secretary.

Mr. Breckenridge moved a resolution to the following effect:

That the Secretary be directed to inform the House of Representatives that the Senate will, to-morrow, at 12 o'clock, proceed with the trial of Samuel Chase;

which was agreed to without one dissenting voice, 34 members voting for it.

Whereupon the Senate withdrew to their legislative apartment.

[76] Senate Impeachment Journal, p. 516.

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2353. Chase's impeachment continued.

The answer and replication being filed in the Chase impeachment, the court proceeded to hear testimony.

Proclamation made by the Sergeant-at-Arms at the opening of the Chase trial for presentation of evidence.

Witnesses on both sides were called at the opening of the Chase trial.

The managers not being ready to present testimony at the opening of the Chase trial, the court granted their motion to postpone.

On February 8 [77] the high court of impeachments having met, it was

Ordered, That the Secretary notify the House of Representatives that the Senate are ready to proceed further on the trial of the impeachment of Samuel Chase, one of the associate justices of the Supreme Court.

The managers, accompanied by the House of Representatives in Committee of the Whole House, accordingly attended.

Samuel Chase, the respondent, attended with his counsel.

Proclamation was made to keep silence, and also as follows:

Oyes! Oyes! Oyes!

Whereas a charge of high crimes and misdemeanors hath been exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against Samuel Chase, one of the associate justices of the Supreme Court, all persons concerned are to take notice that he now stands upon his trial, and they may come forth in order to make good the said charge.

The President informed the managers that they were at liberty to proceed in support of the articles of impeachment exhibited.

On request of Mr. Randolph the witnesses on behalf of the managers were called.

On request of Mr. Hopkinson, counsel for the respondent, his witnesses were called.

Mr. Randolph observed that various considerations, which it was unnecessary to detail, induced him, on behalf of the managers, to move a postponement of the trial till to-morrow, when they hoped to be prepared to proceed with it.

Mr. Harper said that, on behalf of Judge Chase, he would not object to the motion.

The President informed the managers that the Senate acceded to their request, and added, that the Senate would attend to-morrow at 12 o'clock, for the purpose of proceeding with the trial.

The court thereupon adjourned.

2354. Chase's impeachment continued.

During the Chase trial the House attended daily without notice from the court, except on a special occasion, when the hour was changed.

Order of proceeding in the Chase trial during the introduction of evidence.

The journal of an impeachment trial records the names of witnesses, but not their testimony, except when it is subject of objection.

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[77] Senate Impeachment Journal, p. 517; Annals, p. 152.

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By consent, during the Chase trial, a witness for respondent was examined while the managers were presenting testimony.

In an impeachment trial the discharge of witnesses is determined by the Senate, sometimes in conformity with the consent of the parties.

Mr. Justice Chase, after attending during much of his trial, asked leave to retire, and was informed that the rules did not require his attendance.

Mr. Justice Chase did not, after reading his reply, participate personally in the conduct of his case, beyond waiving objection to one question.

The Presiding Officer of the Senate frequently put questions to witnesses during the Chase trial.

In the Chase impeachment the respondent introduced additional counsel during the trial.

On February 9,[78] and thereafter during the continuation of the trial, the high court met daily at 12 o'clock, and until February 23, near the end of the session, the House of Representatives in Committee of the Whole House attended with the managers without notice from the court. A single exception is noticed, however. On February 13 [79] the two Houses met at noon to count the electoral vote. After that duty was concluded, the Secretary of the Senate presented the following message:

Mr. Speaker: I am directed to inform this House that the Senate will, at half past 2 o'clock on this day, be ready to proceed on the trial of the impeachment against Samuel Chase, one of the associate justices of the Supreme Court of the United States.

Accordingly the managers and the House attended.

The trial proceeded in this order:

On February 9,[80] Mr. Randolph, chairman of the managers, opened the cause. Then witnesses for the managers were sworn, gave testimony, and were cross-examined. The Journal states the name of each witness, but not his testimony, unless any portion was objected to and became the subject of decision by the court. On February 13,[81] while the managers were still presenting their testimony, at the request of Mr. Harper, counsel for the respondent, and with the consent of the managers, John Basset, a witness on the part of Judge Chase, was sworn and examined, in consequence of the peculiar situation of his family requiring his immediate return home.

On February 14,[82] while the managers were putting in their testimony, the respondent requested that Charles Lee, esq., might also be allowed to appear as one of his counsel.

On February 15,[83] the managers having completed their testimony, the respondent was notified that he might proceed to make his defense. Thereupon Mr. Harper, in his defense, addressed the court, and then proceeded to adduce witnesses.

On February 19,[83] on request, and with consent of parties, David Robinson, a witness, was discharged.

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[78] Journal of Impeachments, p. 517; Annals, p. 153.
[79] House Journal, p. 137; Senate Impeachment Journal, p. 518.
[80] Senate Impeachment Journal, p. 517.
[81] Senate Impeachment Journal, p. 519; Annals, p. 222.
[82] Senate Impeachment Journal, p. 519.
[83] Senate Impeachment Journal, p. 522.

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Also on February 19,[84] the following occurred:

Mr. HARPER. I am desired by Judge Chase to make of this honorable court the request contained in the following letter, which I will read:

"Mr. President. The state of my health will not permit me to remain any longer at this bar. It is with great regret I depart before I hear the judgment of this honorable court. If permitted to retire, I shall leave this honorable court with an unlimited confidence in its justice; and I beg leave to present my thanks to them for their patience and indulgence in the long and tedious examination of the witnesses. Whatever may be the ultimate decision of this honorable court, I console myself with the reflection that it will be the result of mature deliberation on the legal testimony in the case, and will emanate from those principles which ought to govern the highest tribunal of justice in the United States."

The President observed that the rules of the Senate did not require the personal attendance of the respondent; whereupon Judge Chase bowed in a very respectful manner and withdrew. Until this time the respondent had attended each day. Thereafter he did not attend. While in attendance he had not, after the reading of his reply, participated personally in the conduct of the defense, except in one instance to say that he had no objection to a question which his counsel had challenged.[85]

The President of the Senate frequently put questions to the witnesses as the trial proceeded.

On February 20,[86] at the conclusion of the testimony, a request was made that a certain witness, a Mr. Tilghman, be discharged, and the following took place:

Mr. Harper said the counsel for the respondent would have no objection to discharge all the witnesses, but must object to discharging part of them.

The PRESIDENT. If the gentlemen do not agree upon the discharge of the witnesses, I will take the sense of the Senate upon the point.

Mr. HARPER. The particular situation of Mr. Tilghman's family requires his return to Philadelphia. I must therefore request that his further attendance be dispensed with.

The managers consented, and Mr. Tilghman was discharged.

The question was then taken by the President on the discharge of the witnesses, and lost; there being 16 votes in the affirmative and 17 in the negative.

Mr. Rodney requested the discharge of the witnesses from Delaware; which being consented to by the respondent's counsel, they were discharged.

It may be proper here to notice that, from time to time, during the trial, witnesses were discharged with consent of the parties.

2355. Chase's impeachment, continued.

In the Chase impeachment, by agreement, the managers had the opening and close of the final arguments.

Those making the final arguments of the Chase trial were limited neither as to time nor numbers.

On February 19,[87] the following occurred as to the concluding arguments:

The PRESIDENT. Is the course of the arguments on each side understood?

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[84] Journal, p. 522; Annals, p. 310.
[85] Annals, p. 171.
[86] Annals, p. 312.
[87] Annals, p. 311.

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Mr. NICHOLSON. We understand that the managers will open; that reply will be made by the counsel for the respondent, and that the managers will then close.

Mr. KEY. This is the usual course, and we have no objection to it.

The testimony being closed, on February 20,[88] Mr. Early commenced for the managers the argument in support of the articles, and was followed by Mr. Campbell, also in behalf of the managers, and then by Mr. Clark, also a manager.

Then Messrs. Hopkinson, Key, Lee, Martin, and Harper were severally heard for the respondent.

Finally Messrs. Nicholson, Rodney, and Randolph concluded for the managers.

2356. Chase's impeachment continued.

The managers of the Chase impeachment resisted strenuously the argument that impeachment might be invoked only for indictable offenses.

The argument of Mr. Manager Campbell in the Chase trial on the nature of the power of impeachment.

In their arguments the managers and counsel for the respondent considered not only the evidence as tending to substantiate the charges set forth in the articles, but discussed at length the meaning and application of the Constitution in those clauses establishing the remedy of impeachment.

Mr. Campbell, of the managers, said:[89]

The first provision in the Constitution on this subject (art. 1, sec. 3,), declares that the Senate shall have the sole power to try all impeachments. Here we discover the great wisdom of the framers of the Constitution. The highest and most enlightened tribunal in the nation is charged with the protection of the rights and liberties of the citizens against oppression from the officers of Government under the sanction of law; unawed by the power which the officer may possess, or the dignified station he may fill, complete justice may be expected at their hands. The accused is called upon before the same tribunal, and in many instances, before the same men, who sanctioned his official elevation, to answer for abusing the powers with which he had been intrusted. Men who are presumed to have had a favorable opinion of him once are to be his judges; no inferior or coordinate tribunal is to decide on his case, which might from motives of jealousy or interest be prejudiced against him and wish his removal. No, sir; his judges, without the shadow of temptation to influence their conduct, are placed beyond the reach of suspicion.

The next provision in the Constitution declares that judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States.

Here the Constitution seems to make an evident distinction between such misdemeanors as would authorize a removal from office, and disqualification to hold any office, and such as are criminal, in the ordinary sense of the word, in courts of common law, and punishable by indictment. So far as the offense committed is injurious to society, only in consequence of the power reposed in the officer being abused in the exercise of his official functions, it is inquirable into only by impeachment, and punishable only by removal from office and disqualification to hold any office; but so far as the offense is criminal, independent of the office, it is to be tried by indictment, and is made punishable according to the known rules of law in courts of ordinary jurisdiction. As, if an officer take a bribe to do an act not connected with his office, for this he is indictable in a court of justice only. Impeachment therefore, according to the meaning of the Constitution, may fairly be considered a kind of inquest into the conduct of an officer, merely as it regards his office; the manner in which he performs the duties thereof; and the effects

[88] Senate Impeachment Journal, pp. 522, 523.
[89] Annals, p. 331.

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that his conduct therein may have on society. It is more in the nature of a civil investigation than of a criminal prosecution. And though impeachable offenses are termed in the Constitution high crimes and misdemeanors, they must be such only so far as regards the official conduct of the officer; and even treason and bribery can only be inquired into by impeachment, so far as the same may be considered as a violation of the duties of the officer, and of the oath the officer takes to support the Constitution and laws of the United States, and of his oath of office; and not as to the criminality of those offenses independent of the office. This must be inquired into and punished by indictment.

This position is strongly supported by the mode of proceeding adopted by this honorable court in cases of impeachment. You issue a summons to give notice to the accused of the proceeding against him; you do not consider his personal appearance necessary; you issue no compulsory process to enforce his personal attendance; and you pass sentence, or render judgment on him in his absence. But, in all criminal prosecutions, compulsory process must issue at some stage of it to enforce the defendant's appearance; unless outlawry in England be considered an exception, which, it is believed, is not resorted to in this country, and his personal appearance is considered absolutely necessary; and in almost every case he must be present when sentence is pronounced against him. This construction of the Constitutional provision appears to be absolutely necessary, to avoid the absurd consequence that would arise from a different construction; that of punishing a man twice for the same offense, which could not have been intended by the framers of the Constitution. The nature of the judgment which you are bound to render, and not to exceed, appears also conclusive on this head. You can only remove and disqualify an individual from holding any office of honor, trust, or profit. This can not be considered a criminal punishment; it is merely a deprivation of rights; a declaration that the person is not properly qualified to serve his country. Hence I conceive that, in order to support these articles of impeachment, we are not bound to make out such a case as would be punishable by indictment in a court of law. It is sufficient to show that the accused has transgressed the line of his official duty, in violation of the laws of his country; and that this conduct can only be accounted for on the ground of impure and corrupt motives. We need not hunt down the accused as a criminal, who had committed crimes of the deepest die; and this honorable court are not authorized to inflict a punishment adequate to such crimes, if they had been committed and could be established. With this view of the meaning of the Constitutional provision relative to impeachments, I shall proceed to examine the articles now under consideration, and the evidence given to support them. In the course of this examination, we apprehend it will clearly appear that the whole conduct of the judge in the several transactions, for which charges are alleged against him, had its origin in a corrupt partiality and predetermination unjustly to oppress, under the sanction of legal authority, those who became the objects of his resentment in consequence of differing from him in political sentiments; turning the judicial power, with which he was vested, into an engine of political oppression.

2357. Chase's impeachment continued.

The argument of Mr. Manager Nicholson on the nature of the power of impeachment.

Mr. Manager Nicholson said: [90]

But, sir, there is one principle upon which all the counsel for the accused have relied, upon which they have all dwelt with great force, and to the maintenance of which they have directed all their powers, that we can not assent to; we mean to contend against it, because we believe it to be totally untenable, and because it is of the first importance in the decision of the question now under discussion. We do not contend that, to sustain an impeachment, it is not necessary to show that the offenses charged are of such a nature as to subject the party to an indictment, for the learned counsel have said that the person now accused is not guilty, because the misdemeanors charged against him are not of a nature for which he might be indicted in a court of law.

To show how entirely groundless this position is, I need only pursue that course which has been pointed out to us by the respondent himself and his counsel. I might refer to English authorities of the highest respectability, to show that officers of the British Government have been impeached for offenses

[90] Annals, pp. 562–567.

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not indictable under any law whatever. But I feel no disposition to resort to foreign precedents. In my judgment, the Constitution of the United States ought to be expounded upon its own principles, and that foreign aid ought never to be called in. Our Constitution was fashioned after none other in the known world, and if we understand the language in which it is written, we require no assistance in giving it a true exposition. As we speak the English language, we may, indeed, refer to English authorities for definitions, as we should refer to English dictionaries for the meaning of English words; but upon this, as upon all occasions, where the principles of our Government are to be developed, I trust that the Constitution of the United States will stand upon its own foundation, unsupported by foreign aid, and that the construction given to it will be, not an English construction, but one purely and entirely American.

The Constitution declares that "the judges both of the supreme and inferior courts shall hold their commissions during good behavior." The plain and correct inference to be drawn from this language is, that a judge is to hold his office so long as he demeans himself well in it; and whenever he shall not demean himself well, he shall be removed. I therefore contend that a judge would be liable to impeachment under the Constitution, even without the insertion of that clause which declares, that "all civil officers of the United States shall be removed for the commission of treason, bribery, and other high crimes and misdemeanors." The nature of the tenure by which a judge holds his office is such that, for any act of misbehavior in office, he is liable to removal. These acts of misbehavior may be of various kinds, some of which may, indeed, be punishable under our laws by indictment; but there may be others which the lawmakers may not have pointed out, involving such a flagrant breach of duty in a judge, either in doing that which he ought not to have done, or in omitting to do that which he ought to have done, that no man of common understanding would hesitate to say he ought to be impeached for it.

The words "good behavior" are borrowed from the English laws, and if I were inclined to rest this case on English authorities, I could easily show that, in England, these words have been construed to mean much more than we contend for. The expression durante se bene gesserit, I believe, first occurs in a statute of Henry VIII, providing for the appointment of a custos rotulorum, and clerk of the peace for the several countries in England. The statute recites, that ignorant and unlearned persons had, by unfair means, procured themselves to be appointed to these offices, to the great injury of the community, and provides that the custos shall hold his office until removed, and the clerk of the peace shall hold his office durante se bene gesserit. The reason for making the tenure to be during good behavior was that the office had been held by incapable persons, who were too ignorant to discharge the duties; and it was certainly the intention of the legislature that such persons should be removed whenever their incapacity was discovered. Under this statute, therefore, I think it clear that the officer holding his office during good behavior might be removed for any improper exercise of his powers, whether arising from ignorance, corruption, passion, or any other cause. To this extent, however, we do not wish to go. We do not charge the judge with incapacity. His learning and his ability are acknowledged on all hands; but we charge him with gross impropriety of conduct in the discharge of his official duties, and as he can not pretend ignorance we insist that his malconduct arose from a worse cause.

If, however, a judge were not made liable to removal, from the very nature of the tenure by which he holds his office, we still insist that every judge conducting himself improperly in office comes under that clause of the Constitution which declares that "The President, Vice-President, and civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

We do not mean to contend against a position which one of the learned counsel took so much pains to prove, that the word "high" applies as well to misdemeanors as to crimes; nor do we deem it important at this time to inquire whether a civil officer of the United States can be removed for offenses not committed in the discharge of his official duties. It will be time enough to make this inquiry when the case presents itself. At present we aver that the party charged has been guilty of a high misdemeanor in office, and that he ought to be removed for it.

Here, however, we are met by being told, that although his conduct may have been improper, yet that he is not liable to impeachment, unless the offense is of such a nature as that he might be indicted for it in a court of law.

If this be true, as it relates to a judge, the Constitution, to be consistent with itself, must make it universally true; and yet, if the doctrine be admitted, the

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Constitution will be found to be at variance with itself. Treason is an offense which may or may not be committed in the discharge of official duty, and no doubt the party committing it may be indicted. Bribery is an offense for which a judge may be indicted in the courts of the United States, because an act of Congress makes provision for it, and declares the punishment; but there is no law by which any other officer of the United States can be indicted for bribery. If, therefore, the President of the United States should accept a bribe, he certainly can not be indicted for it, and yet no man can doubt that he might be impeached. If one of the heads of Departments should undertake to recommend to office for pay, he certainly might be impeached for it, and yet, I would ask, under what law, and in what court could he be indicted?

To this, perhaps, it might be answered, that bribery is one of those offenses for which the Constitution expressly provides that the officer may be impeached. This is true; but let us proceed further, and inquire whether there are not other offenses for which an officer may be impeached, and for which he can not be indicted?

If a judge should order a cause to be tried with eleven jurors only, surely he might be impeached for it, and yet I believe there is no court in which he could be indicted. You, Mr. President, as Vice-President of the United States, together with the Secretary of the Treasury, the Chief Justice, and the Attorney-General, as commissioners of the sinking fund, have annually at your disposal $8,000,000, for the purpose of paying the national debt. If, instead of applying it to this public use, you should divert it to another channel, or convert it to your own private uses, I ask if there is a man in the world who would hesitate to say that you ought to be impeached for this misconduct? And yet there is no court in this country in which you could be indicted for it. Nay, sir, it would amount to nothing more than a breach of trust, and would not be indictable under the favorite common law.

But, sir, this ground, which was so strenuously fought for, will probably be abandoned, and instead of our adversaries maintaining that the offense must be of an indictable nature, they will, like one of the honorable counsel (Mr. Harper), go a step back and say that it must be a breach of some known positive law. Thus they will endeavor to shelter their client by saying that there is no act of Congress declaring it illegal for a judge to deliver his opinion on the law before counsel have been heard, or to make political harangues from the bench.

There are offenses for which an officer may be impeached, and against which there are no known positive laws. It is possible that the day may arrive when a President of the United States, having some great political object in view, may endeavor to influence the legislature by holding out threats or inducements to them. A treaty may be made which the President, with some personal view, may be extremely anxious to have ratified. The hope of office may be held out to a Senator; and I think it can not be doubted that for this the President would be liable to impeachment although there is no positive law forbidding it. Again, sir, a Member of the Senate or of the House of Representatives may have a very dear friend in office, and the President may tell him unless you vote for my measures your friend shall be dismissed. Where is the positive law forbidding this, yet where is the man who would be shameless enough to rise in the face of the country and defend such conduct, or bold enough to contend that the President could not be impeached for it?

It was said by one of the counsel that the offense must be a breach either of the common law, a State law, or a law of the United States, and that no lawyer would speak of a misdemeanor, but as an act violating some one of these laws. This doctrine is surely not warranted, for the Government of the United States have no concern with any but their own laws. In a State court, I would speak of a misdemeanor as an offense against a State law; in the courts of the United States, I would speak of it as an offense against an act of Congress; but, sir, as a member of the House of Representatives, and acting as a manager of an impeachment before the highest court in the nation, appointed to try the highest officers of the Government, when I speak of a misdemeanor, I mean an act of official misconduct, a violation of official duty, whether it be a proceeding against a positive law, or a proceeding unwarranted by law.

If the objection that the offense must be of an indictable nature, or against some positive law, means anything, it must be that the misconduct for which a judge or any other officer may be impeached, is either made punishable by, or is a violation of an act of Congress, for we are not to be regulated either by the common law or a State law. What, then, would be the result? I have pointed out

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several instances of gross misconduct in violation of no act of Congress, and yet under this doctrine he is to be permitted to pursue his wicked courses until every possible offense is defined by statute. This too, would teach us that we have done wrong heretofore, for at the last session a judge was impeached and removed from office for drunkenness and profane swearing on the bench, although there is no law of the United States forbidding them. Indeed, I do not know that there is any law punishing either in New Hampshire, where the offense was committed. It was said by one of the counsel that there were indictable offenses. I, however, do not know where, cerainly not in England. Drunkenness is punishable there by the ecclesiastical authority, but the temporal magistrate never had any power over it until it was given by a statute of James I, and even then the power was not to be exercised by the courts, but only by a justice of the peace, as is now the case in Maryland, where a small fine may be imposed.

But the attorney-general of Maryland (Mr. Martin) admits that offenses may be of so heinous a nature that their punishment carries infamy with them, and that, though not committed in the discharge of official duty, yet if against a State law, the party may be impeached and removed from office. This, though not very material to the present question, may serve us in showing how inapplicable the doctrine is, that the offense must be against a State law or the common law. I will suppose that in New Hampshire there is no law punishing profane swearing. In Maryland a magistrate is authorized to impose a fine of 33 cents, and if this is not paid instantly the offender may be put in the pillory and receive thirty-nine lashes. The punishment is infamous, and if inflicted on a judge, according to the idea of this gentleman, he is to be impeached and removed from office. If the same offense is committed in New Hampshire, the judge is not to be removed, not because he has been guilty of a lighter offense, but because there is no State law punishing it. If, then, the State law is to be the criterion, a judge in Maryland is to be removed from office for that which he might do with impunity in another State.

To carry this idea a little further: There was once in the State of Connecticut, and may be yet for aught I know, a celebrated code called the Blue Laws. Under the provisions of this code, I believe it is a fact that a captain of a ship was tied up and publicly whipped, because on returning from a long voyage, he met his wife on a Sunday at the front door and kissed her. This was deemed a high offense, and was ignominiously punished. Now, if we are to be governed by the State laws, I trust the Blue Laws of Connecticut will be rejected, and that our grave judges may be allowed to kiss when and where they please, as to their wisdom shall seem meet, without incurring the pains and penalties of an impeachment. This, sir, may be somewhat ludicrous, but I hope it is not, therefore, the less illustrative of the absurdity of the doctrine contended for. It has been said that the offenses for which a judge or other officer is to be impeached ought to be defined by act of Congress. This is impossible. Such is the multiplicity of passions that sway the human heart, such is the variety of human action, that a code of laws never did and never can exist in which all human offenses are defined. The Constitution is sufficiently definite when it declares that a judge shall hold his office during good behavior, and that all civil officers shall be removed for high crimes and misdemeanors. The law of good behavior is the law of truth and justice. It is confined to no soil and to no climate. It is written on the heart of man in indelible characters, by the hand of his Creator, and is known and felt by every human being. He who violates it violates the first principles of law. He abandons the path of rectitude, and by not listening to the warning voice of his conscience, he forsakes man's best and surest guide on this earth. The best and ablest judge will often err in mere matters of law, but as to principles of duty, in discharging acts of common justice to his fellow-men, he can never err so long as he follows conscience as his guide, and suffers justice to be the only object which he has in view.

2358. Chase's impeachment continued.

The argument of Mr. Manager Rodney on the nature of the power of impeachment.

Mr. Manager Rodney, at greater length, discussed this question:[91]

We have been told by that able lawyer, the attorney-general of Maryland, that a judge can not be impeached for any offense which is not indictable; nor, indeed, for an indictable offense, unless it be a high crime or misdemeanor; and not even

[91] Annals, pp. 591–610.

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for a high crime or misdemeanor, except such as stamp infamy on the character and brand the soul with corruption. A variety of cases have been put to explain his ideas. The law books and the Constitution have been relied on to support those positions, which it becomes my duty to examine. Without troubling you to remove the lumber of the books, let me call your attention, in the first place, to the Constitution. The Constitution shall be my text. I think I shall be able to demonstrate that, in order to render an offense impeachable, it is not necessary that it should be indictable. But, I will go further and prove that, agreeably to the learned counsel's own principles, Judge Chase has committed indictable offenses. Taking his own explanation of crimes and misdemeanors, and recurring to his authority, I will prove that, within the strictest terms of the definition on which he relies, Judge Chase is guilty, not merely of misdemeanors in the various acts of judicial misbehavior, but of aggravated crimes against the express language of the laws and the positive provisions of the Constitution.

In adverting to the Constitution, when looking at one part, we should take a view of the whole instrument to fix the proper construction. In examining any provision, we should consider the bearing and tendencies of all the rest. By adopting this rule we shall preserve order and harmony throughout the system.

The first place in which the subject of impeachment is mentioned in the Constitution is in the first section of the first article. The language used by those who framed it is, in my humble opinion, too plain to be misconceived, and too clear to be misunderstood: "The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment."

This section vests the exclusive authority to impeach in the immediate representatives of the people. The power thus delegated is general and comprehensive. It is not limited to any particular acts or transgressions, but is coextensive with every proper object or subject of impeachment. The House of Representatives is thus constituted, most emphatically, the grand jury of the nation: A high and responsible authority, which, I trust, will always be exercised with prudence and discretion, directed with impartiality and justice. But I do confidently hope that there will ever be found sufficient spirit and firmness to arraign the guilty delinquent, however elevated his station, when the Constitution or laws have been infringed, the tenure of office broken, or its duties violated.

The next passage in order which touches this topic and to which I shall refer is the third section of the same article: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two-thirds of the Members present."

This clause establishes a tribunal for the trial of impeachments. To the Senate this important trust is wisely confided. It prescribes the manner in which the jurisdiction shall be exercised, directs that the Members shall be under oath or affirmation, and fixes the number necessary to convict. Let us proceed a step further in the path: "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law."

The part I have just read contains two very salutary provisions. The first limits the extent of the punishment to be inflicted by the Senate. The second, as a necessary consequence of the former, reserves to the ordinary tribunals of law the right to proceed by indictment. This last provision has been a fruitful source of argument to the learned counsel. They have very ingeniously played upon these terms, and, in the zeal of their imaginations, have fancied that they proved to a demonstration the position, that an offense must be indictable or it is not impeachable. There may be magic in their argument, but I do not perceive there is any logic. The superstructure which they have erected on this basis is easily demolished. From the language of this clause they draw the inference that the framers of the Constitution intended that no person should be impeached for any offense for which he was not liable to be indicted. Is this the fair import of the expressions? The text of this instrument is remarkably free from ambiguity. Clearness, correctness, and precision are its leading characteristics. With a very few exceptions it speaks a language intelligible by all. Had it been the design and wish of the authors of the Constitution that no offenses should be impeachable which were not indictable, they would have declared so in express and positive terms, and left nothing for inference or conjecture. This they have not done, and we may reasonably presume they did not intend to do. They prudently

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looked into the volume of history, where they saw the shocking purposes to which, in evil times, the power of impeachments had been basely and inhumanly prostituted. They read in those instructive pages the dear-bought lessons of experience, and wisely ordained limits which the authority to punish should not exceed. They fixed a ne plus ultra for the tribunal that they established which their severest judgments should not pass. They knew, at the same time, that crimes might be perpetrated and offenses committed which would demand additional chastisement. The loss of office, and disqualification to hold any in future, the maximum of punishment which they had prescribed, would be very inadequate and bear little proportion to the atrocious guilt which might be incurred. Under the influence of these impressions they reserved to the tribunals established by law the right to inflict the just penalties annexed to this class of cases. Without any intention whatever, when any acts had been committed which manifested an unfitness for office, or when there had been a breach of the tenure by which it was held, by malconduct or misbehavior, to prevent the proceedings by impeachment, although the case might not be such as to warrant any additional punishment at law. This, I apprehend, is the object they had in view, and this is the fair, easy, natural, and obvious sense of the words they have used.

Those conversant with the judicial history of England, or who have studied her political annals, must be sensible of the deplorable situation to which that country has been reduced, at different periods, by the abuse of the power of impeachment. The revengeful exercise of this authority has too often deluged the scaffold with blood. In that country the proceeding by impeachment for any offense supersedes all other modes. The person accused, whether he be acquitted or condemned, can not afterwards be indicted for the same offense, or called to an account before the ordinary tribunals. The former course is a complete bar to the latter. To prevent those consequences flowing from a proceeding by impeachment under the Constitution, those who formed that instrument, at the same time that they limited the punishment, have expressly declared it shall have no effect to bar a trial before the ordinary courts, but that the party shall be liable to indictment and punishment according to law. Without this positive provision, as we are almost as much in the habit of drawing on the Bank of England for law as our merchants are for cash or credit, we might have incorporated a principle into our code totally repugnant to the system. The Constitution has drawn the true line on this subject. From a mere reprimand or temporary suspension, the court may ascend in the scale of punishment to removal and disqualification. But thus far can they go and no farther. They can not pass the Rubicon. If the crime deserves a more exemplary sentence recourse must be had to the ordinary mode of proceeding, and then their judgment is not pleadable in bar to an indictment. By this means adequate punishment may in all cases be inflicted.

In England every person, in a public or private capacity, either as an officer or an individual, is liable to be proceeded against by impeachment. In this country the sphere of impeachment is properly limited. The attorney-general of Maryland has taken a long, tedious, and circuitous march to arrive at this point, which I would readily have yielded without an argument. I do not recollect that any of my colleagues contended for the position that every man in this country, in his individual capacity, might be an object of impeachment. For myself I utterly disclaim the idea. Admitting, as I do, in its fullest extent, this wide distinction between the power delegated by the Constitution and that exercised in England, which embraces every subject of that kingdom, how does it bear on the case or affect the argument? After laboring for a considerable time, and employing all his talents, and that fund of legal knowledge which is inexhaustible, to prove that the House of Representatives can not impeach every citizen indiscriminately, the learned attorney-general has not favored us with any application of his principle to the present cause. It proves certainly one among many other broad lines of difference which exist between the British doctrines on the subject of impeachment and the constitutional provisions of this country. In this respect it adds to the weight of our scale. It shows how cautious we should be in bowing down to British precedents which can not be perfectly applicable. I hope I have satisfied the court that the gentlemen are mistaken in their argument on this part of the Constitution. In the general wreck of their defense I conceive this sinking plank, to which they have clung, can not afford them the most distant prospect of safety. We will now proceed a little further in the broad and plain road of the Constitution, carefully examining the ground on which we move.

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By the fourth section of the second article of the Constitution it is provided that "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

The learned counsel have placed great reliance on this passage to prove that an officer must be guilty, not merely of an indictable offense (as they concede every crime or misdemeanor to be), but must have committed a high crime or high misdemeanor to justify an impeachment. One of the learned gentlemen, to fix the true construction of the terms "or other high crimes and misdemeanors," commented at great length on the expressions. To illustrate the subject his fancy readily formed an objection which with logical accuracy he removed. He demonstrated that, agreeably to the strictest grammatical construction and the nicest propriety of speech, the epithet high was to be considered as prefixed to misdemeanors as well as to crimes. In this manner the phantom which his own imagination raised was laid not by a spell, but by the exertion of his argumentative powers. We would willingly have conceded the point and spared him his labor and his breath. We mean not to cavil about trifles or dispute for straws.

Taking it for granted that he has given the proper construction to a part, let us examine what is the just sense of the whole of this passage. In plain English it commands upon the conviction by impeachment of certain atrocious offenses that the guilty officer shall be removed at all events. Depriving the court thus far of the discretion which they would otherwise have possessed as to the judgment they might pass. Having previously limited, in general cases, the punishment which they might inflict, according to their discretion, by establishing a maximum which they should not exceed in this particular grade of flagrant offenses, they have fixed the sentence which they shall pass. The language of the Constitution is peremptory and imperative. Those convicted of such daring enormities of those high crimes or high misdemeanors must be removed from office, which they have justly forfeited. This is the minimum of punishment to be inflicted. Perhaps those who penned the great charter of the Union apprehended that in evil times some high officer of the United States clothed with power and armed with influence might be proved to have committed the base and detestable crime of bribery, or some other equally great, by evidence too strong and too powerful to be resisted, and in an unfortunate hour, awed by fear or seduced by favor, the constitutional judges would not hurl him at once from the seat which he was unworthy to occupy, but permit him to remain in his station, to the disgrace of the country and to the injury of the people. Hence they were induced to make this wholesome provision which left nothing to the discretion of the judges. But is there a word in the whole sentence which expresses an idea or from which any fair inference can be drawn that no person shall be impeached but for "treason, bribery, or other high crimes and misdemeanors?" It does not pretend to specify the various acts of an officer which may subject him to an impeachment; its whole object is to define and fix the punishment which he shall incur on the commission of particular offenses, which is removal from office. This is the least penalty they can inflict in such cases, and God knows it would be much too little had they not in the former part provided that after stripping the traitorous imposter of the insignia of office and power the ordinary tribunals may add to the constitutional sentence of the Senate the fines of forfeitures imposed by law.

From the most cursory and transient view of this passage I submit with due deference that it must appear very manifest that there are other cases than those here specified for which an impeachment will lay and is the proper remedy. In these particular cases the punishment is ascertained, to wit, removal from office; but in a clause to which I have sometime since adverted it is discretionary. Where was the necessity or use of that, if this defined all the impeachable offenses and specified the punishment? We must, if possible, give effect to every sentence of this instrument. We must not suppose that its authors made nugatory provisions. The sense and meaning which I have given to their language and the constructions which I have maintained will give force and effect to every word.

The system of impeachment thus understood, and I humbly submit rationally explained, is perhaps as little liable to exception as any branch of the Constitution. It is stripped of those terrible instruments of death and destruction which have made such dreadful havoc and carnage in the ages that have preceded us. We have been benefited by the sanguinary precedents of barbarous times. We have been taught wisdom ourselves by the folly of others. We have improved

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the advantages we possessed, and thus, according to his own inscrutable ways, has the benevolent Author of our existence brought good out of evil.

In guarding effectually against the cruel and vindictive punishments which the extraordinary tribunal of impeachment might inflict, in the exacerbations of party violence and personal animosity, the fathers of the Constitution took care to provide that a certain grade of offenses should deprive the guilty incumbent of his office, thereby rendering him a harmless object to the community when dispossessed of his abused authority. Nay, they went further. Their wisdom and prudence led them to make a specific declaration that, after being deprived of his power, he should be subject to the legal consequences of his guilt upon trial and conviction before the ordinary tribunals at law. Thus rendering the system perfect and complete.

There is an important provision contained in the Constitution, intimately connected with this subject, to which I now beg leave to refer. It will be found in the first section of the third article:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior."

With this particular part of the Constitution the learned judge must have been more especially acquainted when he accepted of his present office, and must then have expressly accepted it on the terms specified. No man can seriously say that for a judge to continue in the exercise of his authority and the receipt of his salary after any acts of misbehavior is not a violation of this essential provision of the Constitution. He holds his office explicitly and expressly during good behavior. The instant he behaves bad he commits a breach of the tenure by which he holds the possession, and the office becomes forfeited. The people have leased out the authority upon certain specified terms. So long as he complies with them, and not a moment longer, is he entitled to exercise the power which was not intended for his individual advantage, but for their benefit. But, sir, who is to take notice of these acts of misbehavior? How are they to be ascertained, and what shall be considered as such? Are the people in their individual capacity, ipso facto, on the commission of the act to declare the office forfeited, and is a judge then to cease from his labors? Or must it not be officially, or rather judicially, ascertained? This, I conceive, would be the proper mode of procedure. Has the Constitution provided no tribunal for this purpose? I answer it has, most indubitably. By the Constitution the Senate, as the court, and jury, too, in cases of impeachment, has the sole power of removing from offices those who hold them by the tenure of good behavior. If a judge misbehave, he ought to be removed, because agreeably to the plainest provision he has forfeited his right to hold the office. The Constitution having established this single mode of removal, and having declared that a judge shall hold his office only during good behavior, it becomes the duty of the representatives of the people, as the grand inquest of the nation, vested with the general power of impeachment, when they know, of their own knowledge or from the information of their constituents, that acts of misbehavior have been committed, to present the delinquent to this high tribunal, whose powers are competent to inquire into the case and apply the remedy; whose authority is coextensive with the complaint, commensurate with the object, and adequate to the redress of the evil. Shall it be said that it is true the Constitution has declared that a judge shall hold his office no longer than he behaves himself well, and that though he behaves never so ill it has provided no means to turn him out of office if he has the hardihood to remain in his seat? If such a doctrine be contended for, it is too preposterous to receive the sanction of this court. It would render this provision nugatory indeed. It would do more. It would be establishing the principle that whether they behave well or ill they must continue in office, because there was no mode fixed for removing them. This would be the strongest construction that plain language, obvious to the common sense of the most unlettered man, ever received in a court of justice. The method I have pointed out solves all difficulties at once and releases us from every embarrassment on this subject. It makes the Constitution consistent with itself and preserves uniformity throughout all the parts.

The learned counsel were compelled to make a show in maintenance of unsound doctrines to give appearance of support to positions equally untenable.

I flatter myself that every member of this court is by this time convinced that if a judge misbehave, he should be deprived of his office, because guilty of a breach of the tenure by which it is held; that any acts of misbehavior must

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be judicially inquired into and ascertained; that the Constitution, having delegated to the House of Representatives exclusively the general power to impeach, acts of misbehavior are proper subjects of impeachment, upon conviction of which the Senate has the authority to remove an officer, and is bound to exercise it. Shall we be told, then, that no matter how gross the acts of judicial misbehavior, or how flagrant the misconduct of a judge, he can not be removed from office, nay, he can not be impeached, unless guilty of treason or bribery or some crime equally great? Sir, it is impossible that the intelligent understandings and the mature judgments of this court could countenance for a moment such an idea.

The terms "during good behavior" appear to have been considered as very vague and indefinite by the learned counsel for the defendant, from the manner in which they have argued the case. When, in the strong, nervous language of my honorable friend, the conduct of the accused has been described in the most appropriate terms in the articles of impeachment, they have treated them with levity, as if they did not understand their import, because they admitted of no serious refutation. The clear explanation of the expression "during good behavior," and the lucid exposition of this passage contained in the charges themselves, they seem unwilling to comprehend. The commentary is as unintelligible as the text. When to such conduct as was never before witnessed in a court of justice is applied the epithet of novel, we have been told by one counsel that the term is too uncertain to be comprehended—no precise idea can be affixed to it, nor is the language sufficiently technical to constitute a criminal charge. When behavior the most rude and contumelious, disgraceful on any occasion, but truly degrading on the bench and unquestionably criminal, because calculated to bring the judiciary into the the lowest contempt and to excite universal indignation against the tribunals of the country, is portrayed in the impressive style of truth, the age of captious sophistry or technical bigotry is resorted to for proving there is no sense or meaning in the charge. Upon what an ocean of uncertainty have we embarked when the plainest language is not understood! If sound, solid common sense were to be confounded by technical jargon, the tower of Babel would not present a greater confusion of tongues. Sir, when the gentleman can not but feel the force of these charges, with what admirable ingenuity do they attempt to evade them! Is this tribunal, say they, to erect itself into a court of honor, or assume the chair of chivalry, and form a scale by which decorum and good manners may be nicely graduated? Is every slight deviation from the line of politeness at an assembly or drawing-room to be marked with accuracy and chastised with severity? The testimony furnishes apt and ready answers to those questions. The learned judge is not arraigned because he does not possess the polished manners of an accomplished gentleman, but for outraging all the rules of decency and decorum by conduct at which the plain sense of every honest man would revolt.

I beg this court seriously to consider whether a judge may not be guilty of acts of misbehavior inferior in criminality to treason or bribery for which he ought to be impeached, though no indictment would lay for the same. When gentlemen talk of an indictment being a necessary substratum of an impeachment I should be glad to be informed in what court it must be supported. In the courts of the United States or in the State courts? If in the State courts, then in which of them? Or, provided it can be supported in any of them, will the act warrant an impeachment? If an indictment must lay in the courts of the United States, in the long catalogue of crimes there are very few which an officer might not commit with impunity. He might be guilty of treason against an individual State, of murder, arson, forgery, and perjury, in various forms, without being amenable to the Federal jurisdiction, and unless he could be indicted before them he could not be impeached. Are we then to resort to the erring data of the different States? In New Hampshire drunkenness may be an indictable offense, but not in another State. Shall a United States judge be impeached and removed for getting intoxicated in New Hampshire, when he may drink as he pleases in another State with impunity? In some States witchcraft is a heinous offense, which subjects the unfortunate person to indictment and punishment; in several other States it is unknown as a crime. A greater variety of cases might be put to expose the fallacy of the principle and to prove how improper it would be for this court to be governed by the practice of the different States. The variation of such a compass is too great for it to be relied on. This honorable body must have a standard of their own, which will admit of no change or deviation. The test by which they will try an impeachment can not be that of indictment. Even in England, to whose practice and whose precedents such constant recourse has

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been had, the learned counsel have not adduced a single case where a judge of one of their superior courts has been indicted for any malconduct in office. Nay, I believe I may defy them to show an example of the kind. The best authorities tell us they are not subject to indictment, but may be proceeded against by impeachment. They have been impeached, convicted, and punished for giving opinions which they knew to be contrary to law, and for a variety of misdeeds, but never in a solitary instance that I know of have they been indicted. I think I can put so many striking cases of misconduct in a judge for which it must be admitted that an impeachment will lay, though no indictment could be maintained, that the learned counsel themselves must be compelled at length to surrender this post at discretion, without any terms of capitulation. I will not state the case of a judge willfully and designedly neglecting to hold a court on the day prescribed by law, for I am aware of the answer gentlemen would give, that it is an offense against a particular provision. But let use suppose Judge Chase, to comply with the forms of the law at the time appointed, should appear and open the court, and notwithstanding there was pressing business to be done he should proceed knowingly and willfully to adjourn it until the next stated period. He would be guilty of no violation of any positive law for which he might be punished by indictment; but ought he not to be impeached? Suppose he proceeded in the dispatch of business, and from prejudice against one party or favor to his antagonist he ordered on the trial of a cause, though legal grounds are exhibited for postponement. Is this not a proper subject of impeachment? And yet there is no express law infringed. If when the jury return to the bar to give the verdict, he should knowingly receive the verdict of a majority, is there any positive provision by which a jury shall be composed of twelve men and that their decision shall be unanimous? I believe even the learning of that profound lawyer (Mr. Martin), from the reading of laborious years and the indefatigable researches of a life devoted to the pursuit of his profession, could not show any positive provision in the Constitution of the United States or any statute of Congress on the subject. So far from it being originally necessary in civil cases that a jury should be unanimous, the late Judge Wilson (a great and venerable authority), magnum et memorabile nomen, asserts that a majority always decided agreeably to the primary principles of that valuable institution.

Again, there is no man so ignorant as to be insensible to manifest violations of the sanctuary of a court. It was never intended as a stage for the exhibition of pantomimes or plays. Were a judge to entertain the suitors with a farce or a comedy, instead of hearing their causes, and turn a jester or buffoon on the bench, I presume he would subject himself to an impeachment; and yet there is no positive law preventing a court from being converted into a theater or of preferring the buskin to the sock. If he should exhibit a tragic scene, in which an unfortunate fellow-citizen might find himself really no actor in the part which he bore, I presume his conduct would claim the attention of the House of Representatives, as the grand inquest of the nation. It must be unnecessary to multiply examples of misconduct in a judge against the known law of his duty, so manifest at first blush that the most callous conscience can not be insensible to them, not minutely specified and described (for that would be impossible) by particular provision in any legislative act, but all embraced and comprehended in the solemn oath which he takes to perform his duty faithfully and impartially as a judge. As a judge he is bound to execute the laws. Every opinion which he gives and every sentence which he passes must be in conformity to law and be authorized by it. It ought to be the judgment of the law and not his own individual opinion. If he willfully make a decree not sanctioned by law, he is guilty of misbehavior as a judge, for it is a glaring violation of the fundamental principles of his office. I shall have occasion in the course of my argument to advert to judicial opinions delivered by the accused which there was no legislative act to warrant, no precedent to authorize, no principle to sanction, and which the utmost latitude of legal discretion would not justify. In such a case, if this court be satisfied that he acted innocently wrong, that it was an honest error of judgment which led him astray, he will no doubt stand acquitted. But if, from a concurrence of circumstances, they are convinced that he erred through design, from prejudiced and partial motives, though he may not have been corrupted by a bribe, they will consider him as a proper subject of their jurisdiction, and a proper object for the exercise of their authority.

The doctrines of the learned counsel for the defendant would lead to a conclusion which they may not have contemplated, but which the country would feel. Time would fail me to enumerate the different offenses of various grades

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which a judge might commit, and for which he ought most assuredly to be impeached, though no indictment could be maintained in any of the Federal courts. If their positions were correct, a judge might violate all the Ten Commandments without subjecting himself to impeachment and removal; for I know of no method of removal but through the medium of impeachment. There is no law of the United States prohibiting drunkenness on the bench, or indeed punishing this vice at all, unless we look into the laws of a naval or military court-martial, and yet a judge ought certainly to be removed from office if guilty of habitual intoxication. The use of profane or obscene language by a judge is not expressly proscribed by any act of Congress with which I am acquainted, though if it were forbidden in general terms gentlemen might say with as much propriety as they have done in other cases, in the course of their argument, that every term, considered as such, ought to be enumerated, and yet, I believe, should a judge, in his place, be guilty of taking the name of his God in vain, of cursing and swearing on the bench, or using the obscene language of Billingsgate or St. Giles, he ought to be impeached and removed. The sanctity of a court should be preserved unsullied, and the officer displaced who was capable of exhibiting so shocking an example, calculated to destroy all respect for, and confidence in, the judicial establishment of the country, and to corrupt the morals of the nation. But, sir, why need I enlarge on this subject? The counsel for the defendant have appeared at one stage of their argument to possess great respect and deference for precedent. To consider cases solemnly argued or deliberately adjudged as fixing the law so perfectly as to justify a court in absolutely preventing any counsel even though concerned for a criminal, and that, too, in a capital case, from questioning principles thus established. If precedent will furnish us with a clue to the intricate labyrinth in which they have attempted to involve us, we are in possession of one equal to that of Ariadne.

Suffer me again to refer them to the precedent which I cited a few days since. I allude to the case of Judge Addison, in Pennsylvania. One of the counsel (Mr. Martin), for whose legal erudition I feel the greatest respect, has endeavored to impeach the authority of the highest tribunal in that State, and has asked if that decision is to be a precedent for this court? I was the more surprised at this, because his colleague (Mr. Lee) had cited, in the course of his argument, a case from Kirby's Connecticut Reports, decided by Chief Justice Ellsworth and his associates. I ask, sir, in reply, whether, when a case determined in one of the ordinary courts of Connecticut has been produced by the opposite counsel as entitled to consideration, the decision of the senate of Pennsylvania, the highest court of criminal judicature in that Commonwealth, ought not to be respected. Permit me to add that, in my humble opinion, there is as much propriety in referring to such examples as in recurring to British precedents. I have said, and with increasing confidence I repeat it, that this case, under the constitution of Pennsylvania, is emphatically stronger than the present, under the Constitution of the United States, on the much-litigated question whether a judge can be impeached for any act for which he can not be indicted. In the constitution of Pennsylvania, article 5 and section 2, there is a provision not to be found in the Constitution of the United States, by which a judge, for any reasonable cause, which shall not be sufficient ground for impeachment, may be removed by the governor, on the address of two-thirds of each branch of the legislature. This provision would seem to be intended to meet the distinction which the learned counsel have labored to establish. In this light Judge Addison himself on his trial considered it, and pressed the point most forcibly on the senate of Pennsylvania. He had the strongest interest in so doing. If this course had been pursued, he would have merely lost his office, but upon conviction by impeachment he dreaded the disqualification to hold any office which the senate might annex to the judgment of removal. But, sir, this is not the only reason, cogent as it is, for considering the case of Judge Addison particularly applicable to the present. It so happens that we have a decision of the supreme court of Pennsylvania on the very objection which the gentlemen now take, when the conduct of Judge Addison was brought before them previous to his being impeached. If the learned counsel will not give full faith and credit to the determination of the senate of Pennsylvania, perhaps they will admit the authority of her supreme court. I hope this tribunal, at least, will give it equal weight with that of the supreme court of Connecticut. A very correct account of the case will be found in the statement of the attorney-general on the trial of Judge Addison, taken in connection with a printed report of the case, which was produced by Mr. Dallas on that occasion. I will not detain this honorable court with reading all which is there recorded on this subject, but will

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refer to pages 51, 52, 64, and 69 of Addison's trial, and endeavor to present them an accurate view of the case.

On the ground of an application filed by J. B. C. Lucas, then an associate judge of the same court in which Judge Addison presided, stating that Judge Addison, on a particular occasion, after having delivered a charge to the grand jury himself, had prevented Judge Lucas from addressing them, by ordering a constable to be sworn and the jury to be taken from the box, the attorney-general moved for leave to file an information against Mr. Addison.

The attorney-general made two points: First, that Judge Lucas had an equal right with the presiding judge to deliver a charge to the grand jury, on principle and authority. The chief justice, Shippen, immediately observed that it was unnecessary to speak to that point or to read authorities, "speak to the second point—Is this conduct the subject of an information?"

After the argument was closed, the opinion of the court (Judge Breckenridge taking no part) was delivered by the chief justice, who stated that the proceeding was arbitrary, unbecoming, unhandsome, ungentlemanly, unmannerly and improper, but "but that it was not indictable, nor the subject of an information," and that there was another remedy, referring no doubt to an impeachment; for the attorney-general states, in page 52, "That from what fell from the judges of the supreme court, when the case was before them, it might be easily inferred that impeachment was the proper mode to correct the evil complained of."

Thus we have the solemn adjudication of the supreme court that conduct in a judge may be impeachable, though no indictment can be maintained for it. We could not have formed for ourselves a precedent more apposite.

An impeachment was accordingly presented against Judge Addison by the constitutional authority to the senate of Pennsylvania. Pardon me for trespassing so much on your time as to read distinctly the articles, in order to put this court in possession of the whole case:

"ARTICLE 1. That the said Alexander Addison, being duly appointed and commissioned president of the several courts of common pleas, in the circuit consisting of the said counties of Westmoreland, Fayette, Washington, and Allegheny, within the territory of the said Commonwealth, while acting as president of the said court of common please of the said county of Allegheny, on Saturday, the 28th day of March, in the year of our Lord 1801, in open court of common pleas, then and there holden in and for the county last aforesaid, did, after John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the court of common pleas of the county last aforesaid, had, in his official character and capacity of judge as aforesaid, and as of right he might do, addressed a petit jury, then and there duly impaneled, and sworn or affirmed, respectively, as jurors, in a cause then pending, then and there, openly declare and say to the said jury, 'that the address delivered to them by the said John Lucas, otherwise John B. C. Lucas, had nothing to do with the question before them, and that they ought not to pay any attention to it;' thereby degrading or endeavoring to degrade and vilify the said John Lucas, otherwise John B. C. Lucas, and his character and office as aforesaid, to the obstruction of the free, impartial, and due administration of justice, and contrary to the public rights and interests of this Commonwealth.

"ART. 2. That the said Alexander Addison, being duly appointed and commissioned president as aforesaid, did, at a court of quarter sessions of the peace and court of common pleas, holden in and for the county of Allegheny aforesaid, on Monday, the 22d day of June, in the year of our Lord, 1801, under the pretense of discharging and performing his official duties as president aforesaid, unjustly, illegally, and unconstitutionally claim, usurp, and exercise authority not given or delegated to him by the constitution and laws of this Commonwealth, inasmuch as he, the said Alexander Addison, president as aforesaid, did, under pretense as aforesaid of discharging and performing his official duties, then and there, in time of open court, unjustly illegally and unconstitutionally stop, threaten, and prevent the said John Lucas, otherwise John B. C. Lucas, also duly appointed and commissioned one of the judges of the said courts, from addressing, as of right he might do, a grand jury of the said county of Allegheny, then and there assembled and impaneled, and sworn or affirmed, respectively, concerning their rights and duties as grand jurymen, thereby abusing and attempting to degrade the high offices of president and judge as aforesaid, to the denial and prevention of public right, and of the due administration of justice, and to the evil example of all others in the like case offending."

You have now a clear and comprehensive view of the grounds on which

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the impeachment was supported. The first charge accuses Judge Addison of speaking, in terms very unjustifiable for a president of a court, of an address delivered to a petit jury by his associate, Judge Lucas. The language which he used, and the manner in which it was proved to have been delivered, are equally exceptionable. His conduct was rude, ungentlemanly, and utterly inconsistent with that decorum and respect which should be inculcated and practiced on the bench, to preserve the credit and the character of a court of justice. Its object and tendency was to deter Mr. Lucas from exercising his judgment and expressing his opinion from the bench, and to reduce him to a perfect cipher.

The other charge was for preventing Judge Lucas from addressing a grand jury. This was effected in the same rude, and insolent manner, as will appear from the testimony of Judge Lucas himself, in pages 33 and 37 of the printed trial.

To support the first article, I believe it would not be possible to find any positive act or special provision prescribing what particular language a president of a court may use, and what he shall not, in reference to the opinion which an associate justice may have delivered. There is no legal barometer for weighing words, nor any particular law embracing all the variety of cases of lighter and darker shades which may occur. The learned counsel who supported the prosecution did not cite a single precedent, even, of the kind. There may have been a law to be found in the breast of every man of common sense and common manners, with which Judge Addison was not unacquainted, and upon which the Senate considered themselves perfectly justified in convicting him. This was the general, but clear and comprehensive law which marked his rights and duties as a judge—the law of his office, prescribed by his oath.

The second article, for preventing an associate judge from delivering a charge to the grand jury after they had received one from the president of the court, could not have been maintained on the ground of any express statute or legal usage. It is the first time I ever heard of such a case. The uniform practice in the courts to which I have been accustomed is for the chief justice or president to deliver the charge. This was more especially the case in the court in which Judge Addison presided, for it appears they had adopted a positive rule on the subject. The practice of a court of justice is generally considered as the law of that court. But the senate, believing on principle (and believing correctly) that the power of all the judges of the court was equal, pronounced a sentence of condemnation.

With these plausible circumstances to countenance him, Judge Addison, a gentleman of considerable celebrity both in the legal and political world, and of unquestionable talents, conducted his own defense. His principal reliance was on the very objection which the learned counsel for the present defendant now make. He contended that he had committed no act for which he was liable to indictment, and that he was, therefore, not subject to impeachment. In the position that his conduct was not indictable, he was supported by the opinion of the supreme court, who had, nevertheless, considered it a fit subject for impeachment. His argument was able and ingenious; but, sir, his objection was anticipated or answered in such a mastery manner, by a chain of reasoning so irresistible, that it produced complete conviction on the minds of the senate of Pennsylvania. This honorable court know the result. He has been not only removed, but disqualified to hold the office of judge in any court of law in that State. We have, then, the deliberate opinion of the senate of Pennsylvania, upon solemn argument, confirming the decision made by her supreme court. If these cases do not furnish us with lessons of instruction, I know not where such lessons are to be read.

I will remark, sir, further, in relation to this case, that had it not been for the extreme anxiety of Judge Addison to propagate his political dogmas from the bench, he would never have been reduced to this serious dilemma. Like the defendant, he converted the sacred edifice of justice into a theater for the dissemination of doctrines to which I hope I shall never subscribe. If I have a desire relative to the administration of justice, paramount to all others, it is that party and party spirit should be banished from every court. My sincere and fervent prayer is that the laws, like the providence of God, may shed their protecting influence equally over all, without respect to persons or opinions.

I have been requested by the attorney-general of Maryland to state another and a recent case which has happened in Pennsylvania. For his satisfaction I will briefly inform this honorable court of all that took place on that occasion, in the least degree applicable to the present trial. Three of the judges of their

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supreme court were accused of fining and imprisoning, without the intervention of a jury, a fellow-citizen, for publishing a paper which they considered as a contempt of court. The judges were defended by two most able and eloquent counsel, who contended that the constitution, the laws, and the practice of Pennsylvania, by adopting the common law doctrines on the subject, justified the proceeding; and that if there was no law to justify it, their conduct flowed from an honest error in judgment, for which they were not liable to impeachment. But, sir, they did not attempt to maintain the position contended for on this occasion, that to support an impeachment the conduct of a judge must be such as to subject him to an indictment. Nor could they, with any consistency, have supported such a doctrine, for their clients had before in the case of Mr. Addison decided that his conduct was not a proper subject of impeachment though it might be of indictment.

This precedent, then, fortifies the former decisions on this point, and adds another authority to those which previously existed, and to which I have adverted.

The judges were acquitted, I acknowledge, and were I to hazard an opinion, I would say because some of the members of the senate of Pennsylvania thought their conduct proceeded from an honest error of judgment. If this court shall be of the same opinion with respect to the conduct of Judge Chase, I trust they will follow the precedent and acquit him, and I shall cheerfully acquiesce in the decision.

I fear I shall fatigue this honorable court by noticing the various cases on this subject, but I can not omit pressing on their attention a decision of the most authoritative and binding nature, because it is one of their own. The case to which I allude and its attending circumstances must be fresh in the recollection of every Member of the Senate. The district judge of New Hampshire was impeached for habitual drunkenness on the bench, and for using profane and indecent language. It was not in evidence to the court that drunkenness or profane and indecent language were indictable by any law of that State. There is no law of the United States, unless we recur to the naval or military code, punishing these vices as offenses. Of course, sir, it was not pretended by the managers on that occasion, of whom I had the honor to be one, that any indictment could be maintained against Judge Pickering in any civil court of the United States, or of the individual State of which he was a citizen. I appeal to your recollection, sir, for the accuracy of this statement; and, let me ask, what was the result? A constitutional majority of the senate pronounced a verdict of guilty and passed a judgment of removal.

One of the counsel (Mr. Harper), of whose argument I may be permitted to observe, without disparagement to the talents and learning of his colleagues, that it contained an able and masterly defense of the conduct of the accused, sunk beneath the weight of this stubborn and conclusive precedent. It was a stumbling block which he could not remove out of his way, and he seemed compelled, reluctantly, to yield the principle to the decisive authority and pointed application of the case.

We have, then, the whole weight of American authority in our scale, whilst the learned counsel have not been able to adduce a single precedent, foreign or domestic, against us. When I speak of precedents, I do not allude to the obscure dicta which may be found by turning over the dark lantern of tradition in remote ages of antiquity, or to the interpolations which may be scattered through the marginal references to the abridgments, by unknown editors; but to some authoritative case which has occurred since the regular date of parliamentary impeachments. The fines which Edward I imposed on some of his judges, in what manner is not certainly known, to replenish, as many have supposed, an exhausted treasury, are familiar to every student. But from the period of impeachment to the present time, I believe no instance of an indictment can be shown against a judge of the Common Pleas, Exchequer, or King's Bench in England, nor against a Lord Keeper or Lord Chancellor, who hold their offices to this day, let it be remembered, during pleasure. The civil business of the Court of Chancery is more important than that of all the other courts, and the decisions of that tribunal have been as impartial I believe as any, notwithstanding the high sounding doctrines of judicial independence. There have been many impeachments, the judges have sometimes been complained of by information in the execrable Star Chamber, but there have been no indictments at law. The Star Chamber has been long since abolished, and the sole method of proceeding against judges of the superior court now is by impeachment. The best writers

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agree, "that judges of record are freed from all presentations whatever, except in Parliament, where they may be punished for anything done by them in such courts as judges." Numerous authorities might be cited on this subject, but I shall content myself with barely referring to them.—1 Hawk., 192, chap. 73, sec. 6; 1 Salk., 396; Woodeson, 596; Jacob's Law Dictionary, title Judges, 12 Co., 25, 26.

Were I to rest the point here, I confidently believe we should be perfectly safe; but I will proceed further, agreeably to my engagement in the commencement of my argument, and demonstrate that, according to their own principles and authorities, Judge Chase has been guilty of crimes and misdemeanors, in the strictest technical sense of the terms, for which he ought to be punished in an exemplary manner.

In contesting the principles that no act is impeachable unless it also be indictable, I have not contended for the position attributed to me by the learned attorney-general of Maryland, that a judge may be impeached for conduct which is not criminal. On the contrary, we rely on supporting this as a criminal proceeding, and the gentlemen are entitled to every advantage which they can reap from this declaration.

I have had occasion to state that I considered every act of misbehavior in a judge as a misdemeanor, and the attorney-general of Maryland has expressed in strong terms his perfect agreement in the opinion that misbehavior is synonymous with misdemeanor. He appeared to imagine that he gained a great advantage by making this concession, and I am content to give him the full benefit to be derived from it. I shall not shrink from the position, but meet the gentleman with pleasure and confidence on this ground. I love to break a lance in the open field of discussion, and disdain every kind of ambush in argument.

As we agree in one point, that misbehavior and misdemeanor are convertible terms, Jacob's Law Dictionary, which quotes the language of Judge Blackstone in his Commentaries, has been recurred to for a definition of a misdemeanor. Let us try the conduct Judge Chase by his text. "A crime or misdemeanor (says Judge Blackstone) is an act committed or omitted, in violation of a public law either forbidding or commanding it." "This general definition comprehends both crimes and misdemeanors, which properly speaking are mere synonymous terms."

There is a public law that prescribes the following oath which Judge Chase took on his entrance into office (1 vol., p. 53): "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially perform all the duties incumbent on me as a judge of the Supreme Court according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Who that reads this solemn and impressive provision, and looks at the plenary evidence we have before us, can hesitate to pronounce the respondent guilty of violating a public law, which he was bound by the most sacred of all human obligation to execute with fidelity? His oath informed him that the law, like the gospel, was no respecter of persons, and yet what have we beheld in his conduct, when a poor unfortunate Fries or a wretched Callender was before him, upon a criminal charge? I appeal to the testimony which I shall by and by comment upon, whether his acts do not prove that he marked them out as victims to be sacrificed on the altar of party? Sir, I can not believe that gentlemen will seriously contend that the expressions "faithfully and impartially to perform his duties," have no definite meaning; that conduct grossly prejudiced, and the most shameless partiality shall be considered as no violations of his solemn oath. If they did, I have too exalted an opinion of the good sense and discernment of the court to believe they would countenance such an idea. Their import is certainly plain and obvious without recurring to the black-lettered lore for explanation. What then was the conduct of the respondent to Fries, if testimony not only unimpeached but unimpeachable is to be believed? Was he not prejudiced both against the unhappy prisoner and his case, which he had from a superabundance of zeal completely prejudged? Or, sir, when he declared Callender ought to be hung and set off with his miserable pamphlet in his pocket, ready scored for his purpose, and proceeded in the most arbitrary manner with his trial, was he impartial, or was he not guilty of the most manifest and daring partiality? Shall he be guilty of all these outrages against the plain language of a public statute, which combines the obligation of an oath with the sanction of a law, and yet be innocent of any crime or misdemeanor? If gentlemen will hold up the acts of Congress in one hand, and the acts of Judge Chase, proved by the testimony, in the other, they will see and be satisfied, that within the strictest

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legal definition he has been guilty of repeated and aggravated violations of public law, and therefore unquestionably of crimes and misdemeanors.

The Constitution, however, is declared to be emphatically the supreme law of the land. This sacred instrument he was bound by a twofold oath to preserve inviolate. All executive and judicial officers of the United States, independent of their oaths of office, are bound by oath to support the Constitution. (Art. 6, sec. 3.)

By the seventh article of the amendments of the Constitution, which have been duly ratified and therefore now form part of that instrument, it is declared, that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

This article secures to every accused individual the right of a trial by an impartial jury. Without their unanimous consent, no matter how eager the Government are for conviction, no person can be punished. Where any man is charged in due form with the commission of a crime, and pleads he is not guilty, the jury are to decide on the whole case whether he be innocent or not. Their verdict must be commensurate with the issue joined, which involves both fact and law, which they have indubitably the right to decide, agreeably to the express and positive provision of the Constitution. This right, therefore, is an original right, flowing from the highest authority. It is beyond doubt a principle and not an incidental right. It is not a right incidental to the trial, but it constitutes the trial itself; for there can be no other trial in the case but by jury.

This same amendment guarantees to the accused the assistance of counsel. How important is this privilege, when it is recollected that veterans of the bar are generally selected to prosecute. The situation, too, of an innocent man, charged with the commission of a crime, is delicate and embarrassing. It excites frequently apprehensions which unfit him for making a defense. I feel myself compelled to declare, upon the authority of the testimony in this case, that the respondent has been proved guilty of violating the supreme law of the land in those great essential provisions. He has deprived accused individuals of a trial by jury, for he would not suffer the jury to decide, or even to hear argument on the subject of the law, and he has deprived them of the benefit of counsel by conduct which drove counsel from the bar. This has happened in more than one instance, and above all, an injured fellow-citizen has been stripped of his invaluable privileges in a capital case. Is this imagination or is it reality? Let the recorded testimony determine. If, however, I am correct, must I not have satisfied this honorable court, agreeably to my promise that taking the learned counsel's own definition, and relying upon his authorities, I have demonstrated that the accused has been guilty of crimes and misdemeanors? But have I not gone further, and shown that he has been guilty of high crimes and misdemeanors, and such as disqualify him for a seat on the bench, so as to come fully within the rule which he has laid down?

God forbid that it should be said, when a judge is guilty of grossly violating not merely a public law, but the supreme law of the land, nay, a law which he was bound by two solemn oaths to support, he is not guilty of any crime or misdemeanor; or that when he violated this supreme law which he is thus obligated to respect, for the purpose of depriving a fellow-citizen, accused of a capital crime, of the benefit of counsel, and the inestimable right of trial by jury, he shall not be declared guilty of high crimes and misdemeanors, which evince a want of integrity, and mark a depravity of heart that completely disqualify him for a judicial office.

I have now finished by observations in reply to the preliminary objections which have been made to this mode of proceeding, and have been reluctantly compelled to discuss them at much greater length than I at first contemplated, from the zeal and pertinacity with which they have been urged and insisted on by the learned counsel opposed to us. Under the impression that I have been successful in this undertaking, I shall hasten to the investigation of the articles themselves.

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2359. Chase's impeachment continued.

The argument of Mr. Manager Randolph on the nature of the power of impeachment.

And Mr. Manager Randolph said: [92]

It has been contended that an offense, to be impeachable must be indictable. For what then, I pray you, was it that this provision of impeachment found its way into the Constitution? Could it not have said, at once, that any civil officer of the United States, convicted on an indictment, should (ipso facto) be removed from office? This would be coming at the thing by a short and obvious way. If the Constitution did not contemplate a distinction between an impeachable and an indictable offense, whence this cumbrous and expensive process, which has cost us so much labor, and so much anxiety to the nation? Whence this idle parade, this wanton waste of time and treasure, when the ready intervention of a court and jury alone was wanting to rectify the evil? In addition to the instances adduced by my right worthy friend (Mr. Nicholson) who first addressed the court yesterday, permit me to cite a few others by way of illustration. The President of the United States has a qualified negative on all bills passed by the two Houses of Congress, that he may arrest the passage of a law framed in a moment of legislative delirium. Let us suppose it exercised, indiscriminately, on every act presented for his acceptance. This surely would be an abuse of his constitutional power, richly deserving impeachment; and yet no man will pretend to say it is an indictable offense. The President is authorized by the Constitution to retain any bill presented for his approbation, not exceeding ten days, Sundays excepted, within which period he may return it to the House wherein it originated, stating his reasons for disapproving it. Now let us suppose that, at a session like the present, which must necessarily terminate on the third of March (and that day falls this year on a Sunday) the President should keep back until the last hour of an expiring Congress every bill offered to him for signature during the ten preceding days (and these are always the greater part of the laws passed at any session of the Legislature), and should then return them, stating his objections, whether good or bad is altogether immaterial. It is true that a vote of two-thirds of each branch may enact a law in despite of Executive opposition; but, in the case I have stated, it would be physically impossible for Congress to exercise its constitutional power. Indeed, over the bills presented to the President within nine days preceding its dissolution, the Legislature might be deprived of even the shadow of control, since the Executive is not bound to make any return of them whatever. Now, I ask whether such misconduct in the President be an indictable offense? And yet is there a man who hears me who will deny that it would be a flagrant abuse, under pretense of exercise of his constitutional authority, for which he ought to be impeached, removed, and disqualified? Sir, this doctrine, that impeachable and indictable are convertible terms, is almost too absurd for argument. Nothing but the high authority by which it is urged, and the dignified theater where it is advanced, could induce me to treat it seriously. Strip it of technical jargon, and what is it but a monstrous pretension that the officers of Government, so long as they steer clear of your penal statutes—so long as they keep without the letter of the law—may, to the whole length of the tether of the Constitution, abuse that power, which they are bound to exercise with a sound discretion and under a high responsibility for the general good? The counsel who closed the defense (Mr. Harper) felt that this ground trembled beneath his feet; and, fearing to be swallowed up in the yawning ruin, he precipitately abandoned it. He shifts from the position taken by his associates, and lays down this principle "that an offense, to be impeachable, need not be indictable, yet it must have been committed against some known law." Well, take the question in this point of view, and there is no longer matter of dispute between us; it is reduced to a miserable quibble. For what do we contend?—that the respondent has contravened the known law of the land and of his duty, which required him "to dispense justice faithful and impartially, and without respect to persons." He stands charged with having sinned against this law and against his sacred oath, by acting in his judicial capacity unfaithfully, partially, and with respect to persons. These are our points. We do charge him with misdemeanor in office. We aver that he hath demeaned himself amiss—partially, unfaithfully, unjustly, corruptly. This is the sum and substance of our accusation, and this we have established by undeniable proof. I will waste no more time in attempting to dislodge our opponents from a position which they have abandoned in the face of day.

[92] Annals, pp. 642, 643.

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2360. Chase's impeachment continued.

The counsel of Mr. Justice Chase argued elaborately that the power of impeachment applied only to indictable offenses.

Argument of Mr. Joseph Hopkinson, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

On the other hand the counsel for the respondent argued at length that the power should be considered narrower.

Mr. Hopkinson said: [93]

In England the impeachment of a judge is a rare occurrence. I recollect but two in half a century. But, in our country, boasting of its superior purity and virtue, and declaiming ever against the vice, venality, and corruption of the Old World, seven judges have been prosecuted criminally in about two years. A melancholy proof either of extreme and unequaled corruption in our judiciary, or of strange and persecuting times among us.

The first proper object of our inquiries in this case is, to ascertain with proper precision what acts or offenses of a public officer are the objects of impeachment? This question meets us at the very threshold of the case. If it shall appear that the charges exhibited in these articles of impeachment are not, even if true, the constitutional subjects of impeachment; if it shall turn out on the investigation that the judge has really fallen into error, mistake, or indiscretion, yet if he stands acquitted in proof of any such acts as by the law of the land are impeachable offenses, he stands entitled to discharge on his trial. This proceeding by impeachment is a mode of trial created and defined by the Constitution of our country; and by this the court is exclusively bound. To the Constitution, then, we must exclusively look to discover what is or is not impeachable. We shall there find the whole proceeding distinctly marked out; and everything designated and properly distributed necessary in the construction of a court of criminal jurisdiction. We shall find (1) who shall originate or present an impeachment; (2) who shall try it; (3) for what offenses it may be used; (4) what is the punishment on conviction. The first of these points is provided for in the second section of the first article of the Constitution where it is declared that "the House of Representatives shall have the sole power of impeachment." This power corresponds with that of a grand jury to find a presentment or indictment. In the third section of the same article the court is provided before whom the impeachment thus originated shall be tried: "The Senate shall have the sole power to try all impeachments." And the fourth section of the second article points out and describes the offenses intended to be impeachable, and the punishment which is to follow conviction, subject to a limitation in the third section of the first article.

Have any facts, then, been given in evidence against the respondent which makes him liable to be proceeded against by this high process of impeachment? What are the offenses? What is the constitutional description of those official acts for which a public officer may be arraigned before this high court? In the fourth section of the second article of the Constitution it is declared that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." Treason or bribery is not alleged against us on this occasion. Our offenses, then, must come under the general description of "high crimes and misdemeanors," or we are not impeachable by the Constitution of the United States. I offer it as a position I shall rely upon in my argument, that no judge can be impeached and removed from office for any act or offense for which he could not be indicted. It must be by law an indictable offense. One of the gentlemen, indeed, who conduct this prosecution (Mr. Campbell), contends for the reverse of this proposition, and holds that for such official acts as are the subject of impeachment no indictment will lie or can be maintained. For, says he, it would involve us in this monstrous oppression and absurdity, that a man might be twice punished for the same offense, once by impeachment and then by indictment. And so most surely he may; and the limitation of the punishment on impeachment takes away the injustice and oppression the gentleman dreads. A slight attention to the subject will show the fallacy of this gentleman's doctrine. If the absurdity and oppression he fears will really ensue on indicting a man for the same offense for which he has already been impeached, they must be charged to the Constitution itself, which, in the third section of the first article,

[93] Annals, pp. 356–364.

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after limiting the extent of the judgment in cases of impeachment, goes on to declare that "the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." The idea of the honorable manager is that for acts done in the course of official duty a judge must be proceeded against exclusively by impeachment; and that no indictment will lie in such case. The incorrectness of this notion appears not only from a reference to the Constitution, but to the known law of England also. I will remind you of a case, stated, I believe, in the elementary books of the law, in which it is said that if a judge undertakes, of his own authority, to change the mode of punishment prescribed by law for any crime, he is indictable; for instance, should he sentence a man to be beheaded when the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, sir, I contend, that, in order to sustain an impeachment, an offense must be proved upon the respondent which would support an indictment, I do not mean to be understood as admitting that the converse of the proposition is true—that is, that every act or offense which is impeachable is indictable. Far from it. A man may be indictable for many violations of positive law which evince no mala mens, no corrupt heart or intention, but which would not be the ground of an impeachment. I will instance the case of an assault, which is an indictable offense, but will not surely be pretended to be an impeachable offense, for which a judge may be removed from office. It is true that the second section of the first article, which gives the House of Representatives the sole power of impeachment, does not in terms limit the exercise of that power. But its obvious meaning is not, in that place, to describe the kind of acts which are to be subjects of impeachment, but merely to declare in what branch of Government it shall commence. The House of Representatives has the power of impeachment; but for what they are to impeach, in what cases they may exercise this delegated power, depends on other parts of the Constitution, and not on their opinion, whim, or caprice. The whole system of impeachment must be taken together, and not in detached parts; and if one part of the Constitution declaring who shall commence an impeachment, we find other parts declaring who shall try it, and what acts and what persons are Constitutional subjects of this mode of trial. The power of impeachment is with the House of Representatives—but only for impeachable offenses. They are to proceed against the offense in this way when it is committed, but not to create the offense, and make any act criminal and impeachable at their will and pleasure. What is an offense, is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not unitl then, has the House of Representatives power to impeach the offender. So a grand jury posseses the sole power to indict; but in the exercise of this power they are bound by positive law, and do not assume under this general power to make anything indictable which they might disapprove. If it were so, we should indeed have a strange, unsettled, and dangerous penal code. No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned, and that would be crime to-morrow which is innocent to-day.

What part of the Constitution then declares any of the acts charged and proved upon Judge Chase, even in the worst aspect, to be impeachable? He has not been guilty of bribery or corruption; he is not charged with them. Has he then been guilty of "other high crimes and misdemeanors?" In an instrument so sacred as the Constitution, I presume every word must have its full and fair meaning. It is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for high crimes and misdemeanors. Although this qualifying adjective "high" immediately precedes and is directly attached to the word "crimes," yet, from the evident intention of the Constitution and upon a just grammatical construction, it must be also applied to "misdemeanors." The repetition of this adjective would have injured the harmony of the sentence without adding anything to its perspicuity. How would this be in common parlance? Suppose it should be said that at this trial there are attending many ladies and gentlemen. Would it be doubted that the adjective many applies to gentlemen as well as ladies, although not repeated? Or, if there is anything peculiar in this respect in this word "high," I will suppose it were said among the auditors there are men of high rank and station. Would it not be as well understood as if it were said that men of high rank and station are here? There is surely no difference. So in the Constitution, it is said, that "a regular statement of the receipts and expenditures of all public money shall be published from time to time." Is not the account to be regular as wel as the statement?

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I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the Constitution be not admitted, and the adjective "high" be given exclusively to "crimes" and denied to "misdemeanors," this strange absurdity must ensue—that when an officer of the Government is impeached for a crime, he can not be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade. Observe, sir, the crimes with which these "other high crimes" are classed in the Constitution, and we may learn something of their character. They stand in connection with "bribery and corruption;" tried in the same manner and subject to the same penalties. But if we are to lose the force and meaning of the word "high" in relation to misdemeanors, and this description of offenses must be governed by the mere meaning of the term "misdemeanors," without deriving any grade from the objective, still my position remains unimpaired, that the offense, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment. "Misdemeanor" is a legal and technical term, well understood and defined in law; and in the construction of a legal instrument we must give to words their legal significance. A misdemeanor or a crime—for in their just and proper acceptation they are synonymous terms—is an act committed or omitted, in violation of a public law either forbidding or commanding it. By this test, let the conduct of the respondent be tried, and, by it, let him stand justified or condemned.

Does not, sir, the court, provided by the Constitution for the trial of an impeachment gives us some idea of the grade of offenses intended for its jurisdiction? Look around you, sir, upon this awful tribunal of justice—is it not high and dignified, collecting within itself the justice and majesty of the American people? Was such a court created—does such a court sit—to scan and punish paltry errors and indiscretions, too insignificant to have a name in the penal code, too paltry for the notice of a court of quarter sessions? This is indeed employing an elephant to remove an atom too minute for the grasp of an insect. Is the Senate of the United States solemnly convened and held together in the presence of the nation to fix a standard of politeness in a judge and mark the precincts of judicial decorum? The honorable gentleman who opened the prosecution (Mr. Randolph) has contended for a contrary doctrine, and held that many things are impeachable that are not indictable. To illustrate his position, he stated the cases of habitual drunkenness and profane swearing on the bench, which he held to be objects of impeachment and not of indictment. I do not desire to impose my opinions on this court as of any value. But surely I could not hesitate to say that both of the cases put by the gentleman would be indictable. Is there not known to us a class of offenses, not provided for indeed by the letter of any statute, but which come under the general protection which the law gives to virtue, decency, and morals in society? Any act which is contrabonos mores is indictable as such. And it is so, not by act of Congress, but by the pure and wholesome mandates of that common law which some men would madly drive from our jurisprudence, but which I most sincerely pray may live forever.

If I am correct in my position that nothing is impeachable that is not also indictable, for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or must it not be on some known law of the society in which he resides? It must unquestionably be for some offense, either of omission or commission, against some statute of the United States—or some statute of a particular State, or against the provision of the common law. Against which of these has the respondent offended? What law of any of the descriptions I have mentioned has he violated? By what is he to be judged, by what is he to be justified or condemned, if not by some known law of the country; and if no such law is brought upon his case—if no such violation rises on this day of trial in judgment against him—why stands he here at this bar as a criminal? When has he offended? The House of Representatives—and he is impeached for this?

I maintain as a most important and indispensable principle, that no man should be criminally accused, no man can be criminally condemned, but for the violation of some known law by which he was bound to govern himself. Nothing is so necessary to justice and to safety as that the criminal code should be certain and known. Let the judge, as well as the citizen, precisely know the path he is to walk in, and what he may or may not do. Let not the sword tremble over his unconscious head, or the ground be spread with quicksands and destruction which

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appear fair and harmless to the eye of the traveler. Can it be pretended there is one rule of justice for a judge and another for a private citizen; and that while the latter is protected from surprise, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws before made known to him, the latter is to be exposed to punishment without knowing his offense, and the criminality or innocence of his conduct is to depend not upon the laws existing at the time, but upon the opinions of a body of men to be collected four or five years after the transaction? A judge may thus be impeached and removed from office for an act strictly legal, when done, if any House of Representatives for any indefinite time after, shall for any reason they may act upon, choose to consider such act improper and impeachable. The Constitution, sir, never intended to lay the Judiciary thus prostrate at the feet of the House of Representatives, the slaves of their will, the victims of their caprice. The Judiciary must be protected from prejudice and varying opinion, or it is not worth a farthing. Suppose a grand jury should make a presentment against a man, stating that most truly he had violated no law or committed any known offense; but he had violated their notions of common sense—for this was the standard of impeachment the gentleman who opened gave us—he had shocked their nerves or wounded their sensibility. Would such a presentment be received or listened to for a moment? No, sir; and on the same principle, no judge should be put in jeopardy because the common sense of one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of punishment or praise, would thus shift about from day to day. Are we to depend upon the House of Representatives for the innocence or criminality of our conduct? Can they create offenses at their will and pleasure, and declare that to be a crime in 1804 which was an indiscretion or pardonable error, or perhaps an approved proceeding, in 1800? If this gigantic House of Representatives, by the usual vote and the usual forms of legislation, were to direct that any act heretofore not forbidden by law should hereafter become penal, this declaration of their will would be a mere nullity; would have no force and effect, unless duly sanctioned by the Senate and the approbation of the President. Will they then be allowed, in the exercise of their power of impeachment, to create crimes and inflict the most serious penalties on actions never before suspected to be criminal when they could not have swelled the same act into an offense in the form of a law? If this be truly the case, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty prostrated at the foot of this omnipotent House of Representatives; and may God preserve us! The President may approve and sign a law, or may make an appointment which to him may seem prudent and beneficial, and it may be the general, nay the universal, sentiment that it is so; and it is undeniable that no law is violated by the act. But some four or five years hence there comes a House of Representatives whose common sense is constructed on a new model, and who either are or affect to be greatly shocked at the atrocity of this act. The President is impeached. In vain he pleads the purity of his intention, the legality of his conduct, in vain he avers that he has violated no law and been guilty of no crime. He will be told, as Judge Chase now is, that the common sense of the House is the standard of guilt, and their opinion of the error of the act conclusive evidence of corruption. We have read, sir, in our younger days and read with honor, of the Roman Emperor who placed his edicts so high in the air that the keenest eyes could not decipher them, and yet severely punished any breach of them. But the power claimed by the House of Representatives to make anything criminal at their pleasure, at any period after its occurrence, is ten thousand times more dangerous, more tyrannical, more subversive of all liberty and safety. Shall I be called to heavy judgment now for an act which, when done, was forbidden by no law, and received no reproach, because in a course of years there is found a set of men whose common sense condemns the deed? The gentlemen have referred us to this standard, and, being under the necessity to acknowledge that the respondent has violated no law of the community, they would on this vague and dangerous ground accuse, try, and condemn him. The code of the Roman tyrant was fixed on the height of a column, where it might be understood with some extraordinary pains; but here, to be safe, we must be able to look into years to come, and to foresee what will be the changing opinions of men or points of decorum for years to come. The rule of our conduct, by which we are to be judged and condemned, lies buried in the bosom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

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The pure and upright administration of justice, sir, is of the utmost importance to any people; the other movements of Government are not of such universal concern. Who shall be President, or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of Government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favor or fear, from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is forever to be exposed or prosecutions and impeachments for his official conduct, on the mere suggestions of caprice, and to be condemned by the mere voice of prejudice, under the specious name of common sense, can he hold that firm and steady hand his high functions required? No! if his nerves are of iron they must tremble in so perilous a situation.

In England the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that, in our republican institution, the same reasons for it do not exist; that it is indeed inconsistent with the nature of our Government that any part or branch of it should be independent of the people from whom the power is derived. And as the House of Representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this. If I were called upon to declare whether the independence of judges were more essentially important in a monarchy or a republic, I should certainly say, in the latter. All governments require, in order to give them firmness, stability, and character, some permanent principle, some settled establishment. The want of this is the great deficiency in republican institutions. Nothing can be relied upon; no faith can be given either at home or abroad to a people whose systems and operations and policy are constantly changing with popular opinion. If, however, the judiciary is stable and independent; if the rule of justice between men rests upon known and permanent principles, it gives a security and character to a country which is absolutely accessary in its intercourse with the world and in its own internal concerns. This independence is further requisite as a security from oppression. All history demonstrates, from page to page, that tyranny and oppression have not been confined to depotisms, but have been freely exercised in republics, both ancient and modern—with this difference, that in the latter, the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while in the former it is systematically planned and pursued as an ingredient and principle of the government. The people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue, but, while the fit is on, their devastation and cruelty are more terrible and unbounded than the most monstrous tyrant. It is for their own benefit and to protect them from the violence of their own passions that is essential to have some firm, unshaken, independent branch of government, able and willing to resist their frenzy. If we have read of the death of a Seneca under the ferocity of a Nero, we have read too of the murder of a Socrates under the delusion of a republic. An independent and firm judiciary, protected and protecting by the laws, would have snatched the one from the fury of a despot and preserved the other from the madness of a people.

I have considered these observations on the necessary independence of the judiciary applicable and important to the case before this honorable court, to repel the wild idea that a judge may be impeached and removed from office although he has violated no law of the country, but merely on the vague and changing opinions of right and wrong—propriety and impropriety of demeanor. For if this is to be the tenure on which a judge holds his office and character; if by such a standard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary. In opposition to this reasoning I have heard (not from the honorable managers) a sort of jargon about the sovereignty of the people, and that nothing in a republic should be inde-

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pendent of them. No phrase in our language is more abused or more misunderstood. The just and legitimate sovereignty of a people is truly an awful object, full of power and commanding respect. It consists in a full acknowledgment that all power originally emanates in some way from them, and that all responsibility is finally in some way due to them; and whether this is acknowledged or not, they have, if driven to the last resort, a physical force, to make it so. But, sir, this sovereignty does not consist in a right to control or interfere with the regular and legal operations and functions of the different branches of the Government at the will and pleasure of the people. Having delegated their power; having distributed it for various purposes into various channels, and directed its course by certain limits, they have no right to impede it while it flows in its intended directions. Otherwise we have no Government. In like manner the officers of Government are responsible in certain modes, and at certain periods, for the exercise of their duties and powers; but the people have no right to make them accountable in any other manner, or at any other period than that prescribed by the great compact of Government or Constitution. Having parted with their power under certain regulations and restrictions, they are done with it. They are bound by their own act, and having retained and declared the manner in which they will correct abuses in office, they have no right to claim any other sort of responsibility. If this be not the case, what government have we? What rule of conduct? What system of association? None; but we are truly in a state of savage anarchy and ruthless confusion, with all the vices incident to civilization without the restraints to control them.

2361. Chase's impeachment continued.

Argument of Mr. Luther Martin, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

Mr. Martin, counsel for the respondent, said:[94]

We have been told by an honorable manager (Mr. Campbell) that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the Constitution were influenced when they gave this power to the Senate. Who are the officers liable to impeachment? The President, the Vice-President, and all civil officers of Government. In the election of the two first the Senate have no control, either as to nomination or approbation. As to other civil officers who hold their appointments during good behavior, it is extremely probable that, though they were approved by one Senate, yet from lapse of time and the fluctuations of that body an officer may be impeached before a Senate not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason he assigned that, if any other inferior tribunal had been intrusted with the trial of impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed in order to obtain his place; but that no Senator could have such inducement. I, sir, disclaim—I hold in contempt the idea—that the members of any tribunal would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate more than any other court from being influenced? Is there anything to prevent any Member of this Senate or any of their friends from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honorable Court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honorable client with uprightness and impartiality. I have only made these observations to show that the reasons assigned by the honorable manager for vesting the trials of impeachment in the Senate are fallacious.

I see two honorable Members of this court [Messrs. Dayton and Baldwin] who were with me in convention, in 1787, who as well as myself perfectly know why this power was invested in the Senate. It was because, among all our speculative systems, it was thought this power could nowhere be more properly placed or where it would be less likely to be abused. A sentiment, sir, in which I perfectly

[94] Annals, pp. 429–437.

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concurred, and I have no doubt but the event of this trial will show that we could not have better disposed of that power.

Let us now, sir, examine the Constitution on the subject of impeachments, and from thence learn in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject is of infinite importance. An error here would be like what is called an error in the first concoction, and would pervade the whole system.

By the Constitution it is declared that "the House of Representatives shall have the sole power of impeachment." That section, however, does not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend that the power of impeachment is confined to the persons mentioned in the Constitution, namely, "the President, Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach every citizen indiscriminately? For what shall they impeach them? For any criminal act? Is the House of Representatives, then, to constitute a grand jury to receive information of a criminal nature against all our citizens and thereby to deprive them of a trial by jury? This was never intended by the Constitution?

The President, Vice-President, and other civil officers can only be impeached. They only in that case are deprived of a trial by jury; they, when they accept their offices, accept them on those terms, and, as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, can not complain. Here, it appears to me, the framers of the Constitution have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the third, of the Constitution it is declared that judgment in all cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States. This clearly evinces that no persons but those who hold offices are liable to impeachment. They are to lose their offices; and, having misbehaved themselves in such manner as to lose their offices, are with propriety to be rendered ineligible thereafter.

The next question of importance is in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said that a judge can not be indicted for the same crime for which he may be impeached, "for," says the honorable manager (Mr. Campbell), "it would introduce the absurdity that a person might be punished twice for the same crime."

This honorable Court will observe that the two punishments which may here be inflicted on impeachment and subsequent indictment amount to no more than in England takes place on a single prosecution; for there on a single conviction a judge may be removed from office and also fined, imprisoned, or otherwise punished according to the nature of his offense. But the whole of this power the United States have not vested in the same body. To the Senate they have confined the punishment of removal from office, and disqualification of the person from holding offices in future; but can there be a single doubt that a person by impeachment removed from office can not afterward, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? What are the crimes for which an officer can be impeached? "Treason, bribery, and other high crimes and misdemeanors."

Suppose a judge removed from office by impeachment for treason. Would that wash away his guilt? Would he not afterwards be liable to be indicted, tried, and punished as a traitor. Undoubtedly he would; so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes committed by him as a judge, and not for those for which he would be punishable as a private individual! A judge, then, might break open his neighbor's house and steal his goods; he might be a common receiver of stolen goods; for these crimes he might be indicted, convicted, and punished in a court of law; but yet he could not be removed from office because the offense was not committed by him in his judicial capacity, and because he could not be punished twice for the same offense.

The truth is, the framers of the Constitution, for many reasons which influenced them, did not think proper to place the officers of Government in the

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power of the two branches of the Legislature further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon the passions or prejudices of jurors. The very clause in the Constitution of itself shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense.

I shall now proceed in the inquiry, For what can the President, Vice-President, or other civil officers, and, consequently, for what can a judge, be impeached? And I shall contend that it must be for an indictable offense. The words of the Constitution are, "that they shall be liable to impeachment for treason, bribery, or other high crimes and misdemeanors."

There can be no doubt but that treason and bribery are indictable offenses. We have only to inquire, then, what is meant by high crimes and misdemeanors? What is the true meaning of the word "crime?" It is the breach of some law which renders the person who violates it liable to punishment. There can be no crime committed where no such law is violated. The honorable gentleman to whom I before alluded has cited the new edition of Jacob's Law Dictionary; let us, then, look into that authority for the true meaning of the word "misdemeanor." He tells us—

"Misdemesnor, or misdemeanor, a crime less than felony. The term 'misdemeanor' is generally used in contradistinction to felony, and comprehend all indictable offenses which do not amount to felony, as perjury, libels, conspiracies, assaults," etc. (See 4 Comm. c. 1, p. 5.)

"A crime or misdemeanor, says Blackstone, is an act committed or omitted in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors which, properly speaking, are more synonymous terms, though in common usage the word 'crimes' is made use of to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequences are comprised under the gentle name of misdemeanors only.

"In making the distinction between public wrongs and private, between crimes and misdemeanors, and civil injuries, the same author observes that public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." (4 Comm., 5.)

Thus it appears crimes and misdemeanors are the violation of a law exposing the person to punishment, and are used in contradistinction to those breaches of law which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, volume 4, page 5, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his Please of the Crown, volume 1, in his Prœmium, which is not paged, speaking of the division of crimes, says:

"Temporal crimes, which are offenses against the laws of this realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by law appointed for them, or in respect to their nature or degree; and thus they may be divided into capital offenses, or offenses only criminal, or rather, and more properly, into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely, they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors, by acts of Parliament."

Thus, then, it appears that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for higher offenses. But while I contend that a judge can not be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached unless immediately relating to his judicial conduct. Let us suppose a judge provoked by insolence should strike a person; this certainly would be an indictable but not an impeachable offense. The offense for which a judge is liable to impeachment must not only be a crime or misdemeanor, but a high crime or misdemeanor. The word "crime," as distinguished from "misdemeanor," is applied to offenses of a more aggravated nature; the word "high," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, sir, I am ready to go further and say there may

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be instances of very high crimes and misdemeanors for which an officer ought not to be impeached and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person who committed them with turpitude and infamy; such as show there can be no dependence on that integrity and honor which will secure the performance of his official duties.

But we have been told, and the authority of the State of Pennsylvania has been cited by one honorable manager (Mr. Rodney) in support of the position, that a judge may be impeached, convicted, and removed from office, for that which is not indictable, for that which is not a violation of any law.

What, sir! Can a judge be impeached and deprived of office when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach for conduct not criminal; the Senate to convict, does that change the law? No, the law can only be changed by a bill brought forward by one House in a certain manner, assented to by the other, and approved by the President. Impeachment and conviction can not change the law and make that punishable which was not before criminal.

It is true it often happens that the good of the community requires that the laws should be passed making criminal and exposing to punishment conduct, which, antecedently, was not punishable; but even in those cases Government has no power to punish acts antecedently done; it can only punish those acts done after the enaction of the law. The Constitution has declared "no ex post facto law shall be passed."

Should such a principal be once admitted or adopted, could the officers of Government ever know how to proceed? Admit that the House of Representatives have a right to impeach for acts which are not contrary to law, and that thereon the Senate may convict and the officer be removed, you leave your judges and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, sir, with a view to censure the principles or the conduct of any party which has prevailed in the United States since our Revolution, but I wish to bring home to your feelings what may happen at a future time. In republican governments there ever have been, there ever will be a conflict of parties. Must an officer, for instance a judge, ever be in favor of the ruling party whether wrong or right? Or, looking forward to the triumph of the minority, must he however improper their views act with them? Neither the one conduct nor the other is to be supposed but from a total dereliction of principle. Shall, then, a judge by honestly performing his duty and very possibly thereby offending both parties be made the victim of the one or the other, or perhaps of each, as they have power? No, sir; I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, whomever he may displease thereby.

But an honorable manager (Mr. Campbell) has read to us an authority to prove that a judge can not in England be proceeded against by indictment for violation of his official duties, but only in Parliament or by impeachment; his authority was the new edition of Jacob's Law Dictionary. Let me be indulged with reading to this honorable Court the case from 12 Coke, the case of Floyd and Barker to which Jacob refers, and it will be found that the reasons there assigned, however correct they might be as to judges in England, can have no possible application to the judges of the United States.

[Here Mr. Martin read the following part of the third resolution, to wit:]

"It was resolved that the said Barker who was judge of assize, and gave judgment on the verdict upon the said W. P., and the sheriff who did execute him according to the said judgment, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgment were not to be drawn in question, in the Star Chamber, for any conspiracy; nor any witness, nor any other person ought to be charged with conspiracy in the Star Chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony, and although the offender upon the indictment was acquitted, yet the judge, be he judge of assize, or a justice of peace, or any other judge, by commission and of record and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace; and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice will do injustice, but if he hath conspired before

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out of court, this is extrajudicial, but due examination of causes out of the court, and inquiring by testimony and similar is not any conspiracy, for this he ought to do; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, etc., amounts to an unlawful conspiracy.

"And as a judge shall not be drawn in question in the cases aforesaid at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.

"And the reason and cause why a judge, for anything done by him as a judge, by the authority which the King (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the King himself, is for this; the King himself is de jure to deliver justice to all his subjects; and for this, that he himself can not do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath.

"And forasmuch as this concerns the honor and conscience of the King, there is great reason that the King himself shall take account of it, and no other."

But even in England it has been solemnly determined that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable Court to Viner's abridgment, 14th volume, page 579 (F), pl. 3, and in notes, where he says:

"A justice can not rase a record, nor imbecile it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprison, and he shall lose his office and shall make fine for misprison." (In the note "Brooke, Corone pl. 173 cites 2 R. 3, 9, 10, S. C. and P. and that he shall be indicted and arraigned.")

And that to Hawkin's Pleas of the Crown, volume 1, chapter 69, section 6, where that author tells us:

"It is said that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offense of so heinous a nature that it was sometimes punished as high treason, before the 25th Edward III, and at this day it certainly is a very high offense and punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment," etc.

Mr. President, the principle I have endeavored to establish is that no judge or other officer can, under the Constitution of the United States, be removed from office but by impeachment, and for the violation of some law, which violation must be not simply a crime or misdemeanor, but a high crime or misdemeanor.

But an honorable manager (Mr. Rodney), who has this morning referred to some authorities as to other parts of the case has also contested the correctness of the foregoing principle, and has introduced the constitution of the State of Pennsylvania, by which he has told us a judge may, by the governor, be removed from office without the commission of any offense upon the vote of two-thirds of the two houses for his removal notwithstanding that constitution has a similar provision for removal by impeachment as has the Constitution of the United States. To this I answer as we have no such provision in the Constitution of the United States the reverse is to be inferred, to wit, that the people of the United States from whom the Constitution emanated did not intend their judges should be removed, however obnoxious they might be to any part or to the whole of the Legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known that the governor of Pennsylvania has not considered those words in the constitution of that State, "that he may remove the judges on such address," as being imperative. For, in a recent instance, where he did receive such address, instead of admitting the construction to be as was contended, "you must," he determined it to be "I will not," and I have had the pleasure of seeing that judge some time since that transaction on the bench with his brethren dispensing justice. I again repeat that as the framers of the Constitution of the United States did not insert in their Consitution such a clause as is inserted in the constiution of Pennsylvania, it is the strongest proof that they did not mean a judge or other officer should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us that the tenure by which a judge holds his office is good behavior, therefore that he is removable for misbehavior; and, further, that misbehavior and misdemeanor are synonymous and coextensive. Here I perfectly agree with the honorable gentleman and join issue with him. Misbehavior and misdemeanor are words equally extensive and correlative; to misbehave or to misdemean is precisely the same; and as I have

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shown that to misdemean, or, in other words, to be guilty of a misdemeanor, is a violation of some law punishable, so, of course, misbehavior must be the violation of a similar law.

The same honorable gentleman has mentioned the impeachment and conviction of Judge Addison, and has told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge; that this objection was made with much energy on his defense, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas and some other gentlemen that the objection was groundless; they, therefore, convicted and removed him. I have not here the proceedings against Judge Addison and, therefore, it is possible that the senate of Pennsylvania erected themselves into a court of honor to punish what they might consider breaches of politeness; but does this honorable Court sit here to take its precedents from the State of Pennsylvania or any other State, however respectable? I should rather hope that this honorable Court should furnish precedents which might be respected and adopted by the different States. I would also ask, When was that precedent established? Was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and that the senate of Pennsylvania overleaped their constitutional limits? But if we are to go to Pennsylvania for a precedent, why should we not be guided by that which the same State has so recently given us in a trial in which that gentleman bore so conspicuous a part? a precedent of acquittal; a precedent which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our Constitution, as relates to the doctrine of impeachment.

2362. Chase's impeachment, continued.

Argument of Mr. Robert G. Harper, counsel for Mr. Justice Chase, on the nature of the power of impeachment.

And finally, on behalf of the respondent, Mr. Harper said: [95]

The honorable managers, indeed, are as much at war with themselves on this point as with the Constitution and the laws. For when they have told us in one breath that this is merely a question of policy and expediency, they resort in the next to legal authorities, both English and American, for the purpose of explaining the doctrine of impeachment, and of proving that the acts alleged against the respondent amount to impeachable offenses; thus paying an involuntary homage to truth and furnishing an instance of the irresistible power with which she forces herself on the mind, even when most obstinately determined to resist her. Let us also, Mr. President, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England in support of the principle for which we contend. Woodeson, in his Lectures, volume 2, page 611, treating on the law of impeachment, speaks thus: "As to the trial itself, it must of course vary in external ceremony, but differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevail. For impeachments are not formed to alter the law, but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of alleged crimes. The judgment therefore is to be such as is warranted by legal principles or precedents. In capital cases the mere stated sentence is to be specifically pronounced." Thus far this learned professor and commentator of the laws of England; and he cites as authorities for this doctrine Selden and the State Trials; the latter of which, this honorable court need not be informed, is a collection of adjudged cases in the highest courts of England; and the former, a writer of great learning and very high authority, peculiarly tenacious of every principle tending to the security of public liberty, and not likely to mistake on a point so essential as the law of impeachment.

Thus we find that even in England, where the power of impeachment is subject to no express constitutional restrictions and where abuses of that power, for the purpose of party persecution and State policy, have sometimes been committed, and more frequently attempted, an impeachment has never been considered as a mere inquest of office, but always as a criminal prosecution, differing

[95] Annals, pp. 505–514.

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not in essentials from those which are carried on before the ordinary tribunals of justice and subject to the same rules of evidence, and the same legal maxims concerning crimes and punishments, as a proceeding contrived not to alter the law, but to carry it into more effectual execution. These authorities, sanctioned by the practice of one hundred and fifty years, prove the principle for which we contend. Instances may, no doubt, be found in the history of that country where these salutary principles have been disregarded and impeachments have been converted into engines of oppression. But this abuse does not destroy or impair the principle. That remains as eternal as the laws of reason and justice on which it is founded, while the abuse passes into oblivion with the temporary interests and fleeting projects which it was made to subserve, or remains in our recollection as a sad monument of the excesses into which frail man is hurried by his passions.

And has not this great principle of English jurisprudence, which in that country has weathered so many storms of faction, revolution, and civil war, received the sanction also of this honorable court? Has not testimony been rejected because it was judged illegal according to the ordinary rules of evidence? And how could those rules apply to this case unless it were considered as a criminal prosecution?

The Constitution of the United States will as little bear out the managers in their positions as the laws of England. That Constitution gives the power of impeachment to the House of Representatives and to the Senate the power of trying impeachments. Had the authors of that instrument and those who adopted it intended to leave this power at large or to erect it into a general inquest for inquiring into the qualifications of judges and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various restrictions are imposed in the subsequent parts of the instrument, which prove that no person can be impeached except for an offense.

Thus, for instance, in speaking of the power of pardoning, the Constitution provides (art. 2, sec. 2) that "the President may grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Is not this the same thing as saying that cases of impeachment are cases of offenses? What, Mr. President, are offenses in the language of the Constitution and the laws? For a definition of the term "offense," in a constitutional sense, we must consult our law books and not the caprice or the varying opinions of popular leaders or popular assemblies. Those books tell us that the word "offense" means some violation of law. Whence it evidently follows that no officer of Government can be impeached unless he has committed some violation of the law, either statute or common. It is not necessary for me to contend that this offense must be an indictable offense. I might safely admit the contrary, though I do not admit it, and there are reasons which appear to be unanswerable in favor of the opinion that no offense is impeachable unless it be also the proper subject of an indictment. But it is not necessary to go so far, and I can suppose cases where a judge ought to be impeached for acts which I am not prepared to declare indictable. Suppose, for instance, that a judge should constantly omit to hold court, or should habitually attend so short a time each day as to render it impossible to dispatch the business. It might be doubted whether an indictment would lie for those acts of omission, although I am inclined to think that it would. But I have no hesitation in saying that a judge in such a case ought to be impeached. And this comes within the principle for which I contend, for these acts of culpable omission are a plain and direct violation of the law which commands him to hold courts a reasonable time for the dispatch of business, and of his oath which binds him to discharge faithfully and diligently the duties of his office.

The honorable gentlemen who opened the case on the part of the prosecution cited the case of habitual drunkenness and profane swearing on the part of a judge as an instance of an offense not indictable and yet punishable by impeachment. But I deny his position. Habitual drunkenness in a judge and profane swearing in any person are indictable offenses. And if they were not, still they are violations of the law. I do not mean to say that there is a statute against drunkenness and profane swearing. But they are offenses against good morals, and as such are forbidden by the common law. They are offenses in the sight of God and man, definitive in their nature, capable of precise proof and of a clear defense.

The honorable managers have cited a case decided in this court as an authority to prove that a man may be convicted on impeachment without having committed an offense. I mean the case of Judge Pickering. But that case does not support the position. The defendant there was charged with habitual drunkenness and gross misbehavior in court arising from this drunkenness. The defense set up

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was that the defendant was insane, and that the instances adducted of intoxication and improper behavior proceeded from his insanity. On this point there was a contrariety of evidence. It is not for me to inquire on which side the truth lay. But the court, by finding the defendant guilty, gave their sanction to the charge that his insanity proceeded from habitual drunkenness. This case therefore proves nothing further than that habitual drunkenness is an impeachable offense.

As little aid can the honorable gentlemen derive from the case of Judge Addison, on which also they have relied. The articles of impeachment will show that Judge Addison was not impeached, as the honorable gentlemen suppose, for rude and ungentleman-like behavior in court to one of his colleagues; but for a supposed usurpation of power in preventing his colleague, by an exertion of authority, from exercising the right which he was supposed to possess to charge a grand jury, and in exerting his official influence and power to prevent the jury from paying attention to the legal opinions expressed by his colleague in a civil case. The report of that trial, now in my hand, will attest the correctness of this statement and will show also that Judge Addison was so far from being charged with rude and ungentleman-like behavior to his colleague that the honorable gentleman himself towards whom that behavior is supposed to have been used and who gave evidence on the trial, bore testimony to the mildness and politeness of Judge Addison's manner on the occasions which furnished the grounds of impeachment. Whether the acts done by that learned and distinguished judge did amount to an usurpation of unconstitutional power, or whether his colleague did possess those rights in the exercise of which he was supposed to have been improperly restricted, are questions foreign from the present inquiry. But I am free to declare that if Judge Addison's colleague did possess those rights and if he did arbitrarily prevent and impede the exercise of them by an unconstitutional exertion of the powers of his office he was guilty of an offense for which he might properly be impeached, because he must in that case have acted in express violation of the Constitution and laws.

The great principle for which we contend, and which is so strongly supported by the clause of the Constitution already cited, that an impeachment is a criminal prosecution and can not be maintained without the proof of some offense against the laws, pervades all the other provisions of the Constitution on the subject of impeachment. The fourth section of the second article declares "that the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." This provision, I know has been considered by some as a mere direction of what shall be done in those specified cases, and not as a prohibition confining impeachment to those cases. But it must be recollected, Mr. President, that the Constitution is a limited grant of power, and that it is of the essence of such a grant to be construed strictly and to leave in the grantors all the powers not expressly or by necessary implication granted away. In this manner has the Constitution always been construed and understood: and although an amendment was made for the purpose of expressly declaring and asserting this principle, yet that amendment was always understood by those who adopted it and was represented by the eminent character who brought it forward as as a mere declaration of a principle inherent in the Constitution which it was proper to make for the purpose of removing doubts and quieting apprehensions. When, therefore, the Constitution declares for what acts an officer shall be impeached, it gives power to impeach him for those acts and all power to impeach him for any other cause is withheld. The enumeration in the affirmative grant implies clearly a negative restriction as to all cases not enumerated. This provision of the Constitution, therefore, must be considered upon every sound principle of construction as a declaration that no impeachment shall lie except for a crime or misdemeanor; in other words, for a criminal violation of some law.

The same idea is found in the second section of the third article, third clause, where it is declared that "the trial of all crimes, except in cases of impeachment, shall be by jury;" plainly implying that cases of impeachment are cases of "trials for crimes."

It is material, also, Mr. President, to advert to the peculiar force of the term "conviction," which is employed in several parts of the Constitution, in application to cases of impeachment. The third section of the first article, sixth clause, speaking of the trial of impeachments, says: "And no person shall be convicted without the concurrence of two-thirds of the members present." The seventh

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clause of the same section, treating on the extent and operation of a judgment in impeachment, says: "But the party convicted shall nevertheless be liable and subject," etc. And the fourth section of the second article declares that certain officers "shall be removed from office on impeachment for, and conviction of, treason, bribery," etc. This term "conviction" has in our law a fixed and appropriate meaning. There is indeed no word in our legal vocabulary of more technical force. It always imports the decision of a competent tribunal pronouncing a person guilty of some specific offense for which he has been legally brought to trial. In an instrument so remarkable as the Constitution of the United States for technical accuracy in the use of terms the frequent and indeed constant use of this word is decisive to prove that in the intention of the framers of that instrument no man could be impeached except for some offense against law of which he might in legal language be said to be "convicted."

In fixing the construction of this instrument no safer guide can be followed than contemporaneous expositions furnished by those who made or ratified it; and among those expositions the most authoritative are to be found in the constitutions of the several States, formed about the same time, and drawn up in many instances by the same persons. Whenever it appears clearly from the context of these constitutions that they affix a certain meaning to particular terms we may safely infer that those or similar terms in the Constitution of the United States were intended to have the same meaning. And we shall find by inspecting the constitutions of the several States that impeachment has been considered by all of them as a criminal prosecution for the punishment of defined offenses against the laws.

Let us begin with that of Pennsylvania. In treating of impeachments, article the fourth, it speaks of conviction on impeachment, and declares that all civil officers shall be liable to impeachment for any misdemeanor in office. The term "misdemeanor" is of as accurate meaning and of as much technical force as any term in the law. It describes a class of offenses against law, as well defined as any in the criminal code. A still stronger argument is furnished by the second section of the fifth article, which provides that for any reasonable cause which shall not be sufficient ground of impeachment the governor may remove any of the judges on the address of two-thirds of each branch of the legislature. It is most manifest that this provision would have been wholly unnecessary had the people of Pennsylvania, in framing their constitution, considered impeachments, like the honorable managers, merely as inquests of office by which a judge might be removed for any cause which two-thirds of each branch might think reasonable. And the arguments derived from the constitution of Pennsylvania have more force, inasmuch as the terms "misdemeanor in office," used by it for describing impeachable acts, are much less strong than "treason, bribery and other high crimes and misdemeanors," employed by the Constitution of the United States for the same purpose.

The constitution of Delaware, section 22, directs that impeachments shall lie against all persons "offending against the State, either by maladministration, corruption, or other means by which the safety of the State may be endangered." This is a very broad description of impeachable offenses against the laws, liable to punishment in the regular course of justice. It is declared that all impeachments shall be commenced "within eighteen months after the offense committed" and shall be prosecuted by the attorney-general or such other persons as the house of assembly shall appoint, according to the laws of the land. Persons found guilty on impeachment are to be disqualified, or removed, "or subjected to such pains and penalties as the laws shall direct." And the term "conviction," whose peculiar technical force has been already remarked, is applied by this constitution to cases of impeachment.

The people of Maryland did not think fit to invest the legislature with the power of impeachment, but have directed by their bill of rights, section 30, and by their constitution, section 40, that misbehavior in office shall be proceeded against by indictment in a court of law only, and that removal, and, in some cases, disqualification, shall be the consequence of conviction. It will not be denied that "misdemeanor" and "misbehavior in office" are convertible terms. If there be any difference, the latter is the less strong; and yet the people of Maryland have declared that the term "misbehavior in office" means an indictable offense, of which a person may be convicted in a court of law.

The Constitution of Virginia provides that persons offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered, "shall be impeachable by the house of delegates" in the general court, according to the laws of the land; "and that if all or any of the

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judges of the general court should, on grounds (to be judged by the house of delegates), be accused of any of the crimes or offenses above mentioned, such house of delegates may, in like manner, impeach the judge or judges so accused, to be tried in the court of appeals." Hence it appears most clearly that these general words "offending against the State by maladministration, corruption, or other means by which the safety of the State may be endangered," words far more general and indefinite in themselves than those employed by the Federal Constitution, were considered by the people of Virginia as meaning specific crimes or offenses, which might be proceeded against in a court of law according to the usual course of criminal justice. The words "any other means by which the safety of the State may be endangered" are certainly broad enough to embrace those reasons of political expediency and State policy for which the honorable managers contend that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a construction so contrary to the notions entertained in this country respecting legal rights, personal safety, and constitutional liberty.

The provisions made on this subject by the constitution of North Carolina breathe the same spirit. That instrument declares, section 23, "that the governor and other officers offending against the State by violating any part of this constitution, maladministration, or corruption, may be prosecuted on the impeachment of the general assembly or presentment of the grand jury of any court of supreme jurisdiction in this State." This plainly implies that impeachable acts, though described in terms the most indefinite were neither more nor less than offenses indictable in the ordinary course of law.

In the constitution of South Carolina, article 5, we find the same idea necessarily implied. The words "misdemeanor in office" are used as the description of impeachable offenses; the term "conviction" is applied to impeachments, and it is provided that persons so convicted "shall, nevertheless, be liable to indictment, trial, judgment, and punishment, according to law." It is plain, therefore, that the words "misdemeanor in office," were understood and intended by the people of South Carolina to mean offenses against the laws for which the offender might be indicted and "convicted."

The constitution of Georgia contains no words which can operate in any manner to define or describe impeachable offenses. It merely directs who shall have the power of impeaching, who shall try impeachments, and what description of persons may be impeached. But in that of Vermont there is a provision on this subject, which, though very concise, is very strong to our present purpose. Among the powers given by it, section 9, to the House of Representatives is that to "impeach State criminals." This term "criminals," which in our laws is never applied except to persons charged with offenses of the highest nature, sufficiently declares that the people of Vermont considered impeachments as applicable to cases of crimes only, and not to removals for reasons of State expediency; not even to cases of smaller offenses, much less of indiscretion or impropriety of behavior, such as is alleged against the respondent in this case. For surely it would be an abuse of language to apply the term "criminal" to improper interruptions of the counsel, to rude, hasty or intemperate expressions; to ridicule employed by a judge against counsel who, in his opinion, conducted themselves incorrectly, or to the precipitate and ill-timed expression of a correct legal opinion. No, sir. This word imports the intentional violation of some known law, the perpetration of some specific defined crime, which may admit of precise proof, which every citizen may be able to avoid, against which, when accused of it, he may know how to make his defense.

Such, Mr. President, is the solemn exposition of impeachable offenses given by the United States through the medium of their constitutions. Though not accustomed to talk about the will of the people, there is no man that bows with more reverence to that will when constitutionally declared. And shall we, Mr. President, let go this sheet-anchor of personal rights and political privileges to commit ourselves to the storms of party rage, personal animosity, and popular caprice? Shall we throw down this great landmark, fixed by the wisdom and patriotism of our fellow-citizens and fathers? Instead of having our best and dearest rights secured by fixed and known principles of law, shall we leave them to be governed and disposed by the ever varying whims and passion of the moment? No, sir, I trust not. When I look at these benches and recollect how deep a stake the members of this honorable court have in those rights which form the palladium of our safety and are now intrusted to their care and keeping, I can not but confidently expect that they will feel the whole importance of the

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great trust reposed in them by their country; that they will regard themselves as acting for future generations, as well as for the present age; and will elevate themselves above the sphere of little view momentary feelings. They will recollect, sir, that unjust principles, adopted to answer particular purposes, are two-edged swords, which often rebound on the head of him who strikes with them, and that justice, though it may be an inconvenient restraint on our power while we are strong, is the only rampart behind which we can find protection when we become weak. They will remember that power which depends on popular favor is of all sublunary things the most fleeting and transient; that it must, from time to time, change hands; and that when the change which sooner or later must arrive shall have taken place, when those who now direct the thunder of impeachment shall be placed, as ere long they must be, in a situation to be smitten by its bolts, they will be glad to invoke, and unless they now set a great example of correct decision, will invoke in vain those constitutional privileges to which we now cry for safety.

Need I, Mr. President, urge the necessity of adhering to those principles, as it respects the independence of the judiciary department? Need I enlarge on the essential importance that independence to the security of personal rights and to the well-being, nay, to the existence of a free government? These considerations of themselves strike the mind with a force not to be increased by any efforts of mine. It is sufficient merely to bring them into the view of this honorable court.

But it is not to the party accused. to the nation, to posterity, and to the interests of free governments that the observance of settled constitutional principles in cases of impeachment is alone important. It is equally so to the character and feelings of those appointed to judge. Is there any member of this honorable court who would wish, nay, who would consent, in deciding this cause, to be set free from the restraints of the law, or, more properly speaking, to be deprived of its guidance and left to the influence of his own passions, feelings, or prepossessions? Were causes like this to be determined on expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having sought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good? But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach. Is any member of this honorable body prepared to relinquished the high and venerable station of the organ and expounder of the law, in order to assume the doubtful and dangerous character of a judge, subject to no rule but his own arbitrary will?

To a judge, too, it is the sweetest consolation in the discharge of his painful duties that when he has doomed a fellow-citizen to dishonor and misery, he has merely pronounced the decision of the law, and not the dictates of his own will; that he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ. This reflection soothes his mind under the anguish which is must feel from another's woe. And is there any member of this honorable court who would consent to relinquish this consolation? I boldly say, no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish, in the same situation, to hold a different conduct, I envy not their feelings, however highly I might estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well-established doctrine of the Constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those whose lot it may be to sit under the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow-citizen guilty; it will equally claim, and I can not doubt that it will receive the sanction of this honorable court, by whose decision it will, I trust, be established so as never hereafter to be brought into question, that an impeachment is not a mere inquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal, but a criminal prosecution, for the support of which the proof of some willful violation of a known law of the land is known to be indispensably required.

2363. Chase's impeachment, continued.

At the conclusion of the final arguments in the Chase trial, the court set a day and hour for giving final judgment.

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It does not appear surely that the House attended on the final judgment in the Chase impeachment.

In the Chase trial the court modified its former rule as to form of final question.

Two-thirds not having voted guilty on any article, the Presiding Officer declared Mr. Justice Chase acquitted.

As soon as the arguments were concluded, on February 27,[96] it was, on motion of Mr. James Jackson, of Georgia, a Senator—

Resolved, That the court will on Friday next, at 12 o'clock, pronounce judgment in the case of Samuel Chase, one of the associate justices of the Supreme Court of the United States.

On Friday, March 1,[97] the court being opened by proclamation, the managers, accompanied by the House of Representatives, attended.[98]

The counsel for the respondent also attended.

The consideration of the motion, made yesterday for an alteration of one of the rules in cases of impeachments, was resumed; whereupon,

Resolved, That in taking the judgment of the Senate upon the articles of impeachment now depending against Samuel Chase, esq., the President of the Senate shall call on each Member by his name, and upon each article, propose the following question, in the manner following: "Mr. ————, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the ——— article of impeachment?"

Whereupon, each Member shall rise in his place, and answer guilty or not guilty.

The President rose, and addressing himself to the members of the court, said:

Gentlemen: You have heard the evidence and arguments adduced on the trial of Samuel Chase, impeached for high crimes and misdemeanors. You will now proceed to pronounce distinctly your judgment on each article.

The Secretary then read the first article of impeachment.

The article having been read, the President took the opinion of the members of the court respectively, in the form following:

Mr. ————, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the first article of impeachment?

And thus, after the reading of each article, the opinion of the court was taken.

At the conclusion, the President rose and said: On the first article, sixteen gentlemen have pronounced guilty and eighteen not guilty; on the second article, ten have said guilty and twenty-four not guilty; on the third article, eighteen have said guilty and sixteen not guilty; on the fourth article, eighteen have said guilty and sixteen not guilty; on the fifth article, there is an unanimous vote of not guilty; on the sixth article, four have said guilty and thirty not guilty; on the seventh article, ten have said guilty and twenty-four not guilty; and on the eighth article, nineteen have said guilty and fifteen not guilty.

Hence, it appears that there is not a constitutional majority of votes finding Samuel Chase, esq., guilty on any one article. It, therefore, becomes my duty to declare that Samual Chase, esq., stands acquitted

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[96] Senate Impeachment Journal p. 523; Annals, p. 664.

[97] Journal, pp. 523–527; Annals, pp. 664–669.

[98] The House Journal raises a doubt as to whether or not the House as a Committee of the Whole attended. No mention of such attendance is made, after February 23 (Journal, pp. 149–162). It is probable that in the pressure of business, attendance as an organized body was omitted.

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of all the articles exhibited by the House of Representatives against him.

Whereupon, the court adjourned without delay.

It does not appear, from the House Journal,[99] that the decision was communicated to the House; and there is no record in the House Journal that the House attended either as Committee of the Whole or otherwise.

[99] House Journal pp. 157-162.

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Impeachment and Trial of James H. Peck*

1. Preliminary investigation by the House. Sections 2364–2366.
2. The impeachment carried to the Senate. Section 2367.
3. The articles and the managers. Sections 2368–2370.
4. Writ of summons and appearance of respondent. Section 2371.
5. Rules for the trial. Section 2372.
6. Answer of the respondent. Sections 2373, 2374.
7. Replication of the House. Section 2375.
8. Presentation of evidence. Section 2376.
9. Attendance of the House during trial. Section 2377.
10. Final arguments. Section 2378.
11. What are impeachable offenses. Sections 2379–2382.
12. Final decision. Section 2383.
13. Report of trial to the House. Section 2384.

2364. The impeachment and trial of James H. Peck, United States judge for the district of Missouri.

The impeachment proceedings in the case of Judge Peck were set in motion by a memorial.

The investigation into the conduct of Judge Peck were revived by referring to a committee a memorial presented in a former Congress.

Form of memorial praying for an investigation into the conduct of Judge Peck.

The House decided formally to investigate the conduct of Judge Peck only after the Judiciary Committee had examined the memorial.

On December 8, 1826,[1] Mr. John Scott, of Missouri, presented a memorial of Luke Edward Lawless, for an inquiry into the official conduct of James H. Peck, district judge of the United States for the district of Missouri, in relation to certain proceedings on an attachment for contempt had by said judge against said Lawless. This memorial was referred to the Committee on the Judiciary. On February 15, 1827,[2] the House ordered the committee discharged from the consideration of the memorial, and gave leave to the memorialist to withdraw the same.

On December 29, 1828,[3] on motion of Mr. George McDuffie, of South Carolina, it was

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, be referred to the Committee on the Judiciary.

No report was made at this session.

*Hinds' Precedents, vol. 3, p. 772 (1907).
[1] Second session Nineteenth Congress, House Journal, p. 32.
[2] Journal, p. 300.
[3] Second session Twentieth Congress, House Journal, p. 101.

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On December 15, 1829,[4] on motion of Mr. McDuffie, it was

Ordered, That the memorial of Luke Edward Lawless, presented on the 8th December, 1826, praying for impeachment of John H. Peck, judge of the United States court in the State of Missouri, be referred to the Committee on the Judiciary.

This memorial[5] was addressed as follows:

To the honorable the House of Representatives of the United States:

The petition of Luke Edward Lawless, a citizen of the State of Missouri, and of the United States, respectfully showeth:

That, on the 30th day of March, in the present year, 1826, there appeared in the Republican, a newspaper printed in the city of St. Louis, State of Missouri, an article purporting to be the final decree or opinion of the judge of the district court of the United States for the district of Missouri, in the cause in which the widow and heirs of Antoine Soulard were plaintiffs, and the United States defendant, etc.

The memorial goes on to set forth that an appeal had already been taken to the Supreme Court of the United States when this final decree was published; that the petitioner wrote a letter, which was published in a St. Louis newspaper, setting forth in courteous and decorous language the errors of fact and law which he conceived to exist in the decree. This publication, as petitioner conceived, was meritorious rather than censurable, since the land titles of a large district were affected adversely by the decree, and speculators were taking advantage of this fact. The petition goes on to set forth that he was, for this publication, punished by Judge Peck for contempt. In conclusion the memoralist says:

Having thus submitted to your honorable body the facts of his case, and the evidence in support thereof, your petitioner begs leave to observe that it appears from those facts:

First. That the said James H. Peck has, in his capacity of judge of a district of the United States, been guilty of usurping a power which the laws of the land did not give him.

Second. That said James H. Peck has exercised his power, be the same usurped or legitimate, in the case of your petitioner, in a manner cruel, vindictive, and unjust.

Wherefore, and inasmuch as the said James H. Peck has not only outraged and oppressed your petitioner as an individual citizen, but, in your petitioner's person, has violated the most sacred and undoubted rights of the inhabitants of these United States, namely, the liberty of speech and of the press, and the right of trial by jury, your petitioner prays that the conduct and proceedings in this behalf, of said Judge Peck, may be inquired into by your honorable body, and such decision made therein as to your wisdom and justice shall seem proper.

And your petitioner, as in duty bound, will pray.

LUKE EDWARD LAWLESS.

ST. LOUIS, MO., *September 22, 1826.*

Various documents accompanied this memorial, in substantiation of those charges which he offered to prove.

On January 7, 1830,[6] Mr. James Buchanan, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers in the case of the charge of official misconduct against James H. Peck, judge of the district court of Missouri.

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[4] First session Twenty-first Congress, House Journal, p. 39.

[5] For copy of this memorial in full see "Report of the trial of James H. Peck," published in Boston, in 1833, by Hilliard Gray & Co. This publication has the proceedings of the trial in full. The Debates of Congress give them in a very fragmentary form.

[6] House Journal, p. 138.

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2365. Peck's impeachment, continued.

In reporting in favor of impeaching Judge Peck the committee submitted transcripts of testimony.

Following the Chase precedent, the committee refrained from giving their reasons for concluding that Judge Peck should be impeached.

In the investigation of Judge Peck, the respondent cross-examined witnesses, and addressed the committee.

The House declined to print with the evidence in the Peck investigation the memorial or the address of respondent.

The report favoring the impeachment of Judge Peck was committed to the Committee of the Whole House on the state of the Union.

On March 23[7] Mr. Buchanan submitted from that committee the following report:

> That, in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion that James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

In presenting the report Mr. Buchanan stated that the committee[8] deemed it fairest toward the party accused not to report to the House their reasons at length for arriving at the conclusion that he ought to be impeached. In this respect they thought it advisable to follow the precedent which had been established in the case of the impeachment of Judge Chase.

The report contains, however, an abstract of the case of heirs of Antoine Soulard *v.* United States, the opinion of Judge Peck therein, the letter of Mr. Lawless criticizing the opinion, and the court records showing the arrest and punishment of the latter. The journal of the committee also accompanies the report. It gives the testimony of Mr. Lawless and others before the committee, and shows that Judge Peck was present in the committee room in person, and cross-examined the witnesses.

Mr. Buchanan moved that the report, with the document as described and the transcripts of the testimony, be printed. Thereupon Mr. Clement C. Clay, of Alabama, moved to add to the matter to be printed "the memorial of Luke E. Lawless and the address of the judge to the committee." This amendment was disagreed to, and then the original motion of Mr. Buchanan was agreed to.

The report was committed to the Committee of the Whole House on the state of the Union.

2366. Peck's impeachment, continued.

Judge Peck, threatened with impeachment, was permitted to make to the House a written or oral argument.

Judge Peck, threatened with impeachment, transmitted to the House a written argument, which was ordered to be read.

In Judge Peck's case the committee proceeded on the theory of an ex parte inquiry.

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[7] House Journal, p. 454; Debates, p. 637; House Report No. 325.

[8] This committee consisted of Messrs. Buchanan, Charles A. Wickliffe, of Kentucky; Henry R. Storrs, of New York; Warren R. Davis, of South Carolina; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut, and Edward D. White, of Louisiana.

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Judge Peck was not permitted to bring witnesses before the House committee, but cross-examined and filed a statement.

In the Peck case the House, with a view to English precedents, discussed the nature of the inquiry preliminary to impeachment.

Form of memorial in which Judge Peck asked leave to state his case to the House.

On April 5 [9] the Speaker laid before the House a memorial:

To the honorable the Speaker and Members of the House of Representatives of the United States:

The memorial of James H. Peck, judge of the district court of the United States for the district of Missouri, respectfully represents:

That, by a report of the Committee on the Judiciary, made to your honorable body on the 23d March, 1830, on the petition of Luke E. Lawless, it is proposed that your memorialist be impeached of high misdemeanors in office.

The memorialist goes on to describe the status of the case, and says that in view of the gravity of the proceeding he—

presumes that it will not be displeasing to your honorable body to have a full view of the whole ground of this accusation before you proceed to decide finally on the report of the committee. In England, from which we borrow the process of impeachment, the House of Commons has been willing to receive such information from the party accused before they will vote the impeachment.

The memorialist then cites in support of this assertion the case of Warren Hastings.

The memorialist further asks that he may be permitted to adduce against the prima facie impression to his disadvantage arising from the report of the committee the fact that Mr. Lawless's petition had been presented in former Congresses, and that the able men to whom it was referred found no grounds for proceeding.

The petitioner suggests that any method which may be taken to enable him to present "a full exposition of all the facts" will be satisfactory to him, whether by direct address to the House or before a committee.

When the memorial of Mr. Lawless had been referred to the Judiciary Committee, they had notified the present memorialist, Judge Peck, that they would receive "any explanation" which he might think proper to make in reference to the charge. In the brief time allowed he had made such a statement as was possible, although it was inadequate. But when it was handed in, the chairman of the committee did not read it, but proceeded immediately to examine the witnesses.

It is true, also,

continues the memorial—

that your memorialist was permitted to cross-examine, to a certain extent, the witnesses who had been summoned and examined in support of the charge, but this cross-examination was much restricted by frequent objections, and by the strong desire evinced by the committee to get through the examination at least within the two remaining days of the week; and your memorialist having been more than once admonished that he was there ex gratia, felt himself checked and restrained from extending the cross-examination to points which seemed to him to belong to the inquiry, so that his having been permitted to be present under such circumstances is rather a disadvantage to him than a benefit, because it gives to the transaction all the semblance of a free and full investigation of the whole case, without the reality. Your memorialist does not make this remark in censure of the honorable committee; on the contrary, considering the pro-

[9] House Journal, p. 499; Debate, p. 736; House Report No. 345.

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ceeding, as they manifestly seemed to do, as being analogous to an inquiry by a grand jury and to be governed by the same rules, your memorialist is sincerely satisfied that it was their purpose to treat him, as, in this view of the subject, they did in fact treat him, with great liberality and indulgence.

But your memorialist submits, with great respect, that the proceeding of the House of Representatives, in inquiring whether they will, or will not, institute an impeachment, is not to be governed by those strict rules which confine a grand jury to ex parte evidence. It was not the course pursued by the House of Commons of Great Britain, in the case of Warren Hastings, to which he has referred, and in which the House, before they voted the impeachment, heard not only the defense, but the testimony of his witnesses.

And the memorialist concludes:

Your memorialist, therefore, respectfully prays that your honorable body will receive from him a written exposition of the whole case, embracing both the facts and the law, and give him, also, process to call his witnesses from Missouri in support of his statements, before any discussion or vote shall be taken on the evidence as it is now presented with the report of the committee. * * *

If this prayer can not be granted, his hope and prayer is that your honorable body will, if it meet your own approbation, vote the impeachment at once, without any discussion on that partial evidence which presents a garbled view of the subject, greatly to the prejudice of your memorialist, and that he may have as speedy an opportunity as the nature of the case will allow to exhibit before the tribunal of the Senate and before his country the entire transaction, in all its parts, as it really occurred, being conscious and confident that to insure his acquittal from all censure in the minds of all honorable men accustomed to discussions of this kind, the case requires only to be fully understood.

And in the strong hope that the one or the other of these prayers will be granted, your memorialist, as in duty bound, will ever pray.

JAMES H. PECK.

WASHINGTON CITY, *April 5, 1830.*

Mr. Henry R. Storrs, of New York, at once moved that the memorial be referred to the Committee of the Whole House on the state of the Union, to which the report of the Judiciary Committee had already been referred.

A debate [10] at once arose as to the propriety of granting the prayer of the petitioner. Mr. Clement C. Clay, of Alabama, said:

As to precedents, there was no uniformity in them on this subject. One high case had been referred to, that of Warren Hastings, and also that of Judge Chase. But the practice in the several States differed from that which had been pursued by the General Government. In his own State (and he hoped he should not be considered as presumptuous in referring to the practice of a State which had so recently been admitted to the Union) the course pursued in cases of impeachment was different and he thought there were many inducements for the House to pursue the practice there adopted. He could not unite in the opinion that the House should proceed precisely as did a grand jury in ordinary cases of indictment. The present case was totally different. A great officer had been accused of a great offense. Did gentlemen suppose, could they think, that when a high officer of the Government was accused by a private individual he must, on the mere ex parte testimony of that accuser, be at once impeached? Mr. Clay said he should hesitate much before he could subscribe to such an opinion. He thought the House ought to proceed with very great caution. Merely to accuse was not all that was necessary in order to have a judge impeached. Some gentlemen seemed to conceive that the memorial of this petitioner asked that witnesses might be examined at the bar of that House; but it made no such request directly. It only asked this as one alternative—that his witnesses might be heard here, if not elsewhere.

Mr. Buchanan said:

Judge Peck, in that memorial, suggests that the Committee on the Judiciary sent for such witnesses only as had been selected by Mr. Lawless. That is far from being the fact. The committee acted upon higher principles. They were sen-

[10] Annals, pp. 737, 738.

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sible of the high responsibility which they owed, both to this House and to the country, for the correctness of their proceedings; and had, therefore, inquired and ascertained, from the best sources in their power, the names of such witnesses as would be most likely to give an impartial and intelligent statement of the transaction. They had sent for and examined seven witnesses; and he owed it to them to say that, although he had long been in the habit of examining witnesses in courts of justice, he had never observed, on any occasion, more candor or more impartiality than these seven gentlemen had exhibited upon their examination before the committee.

It is true, as the memorial suggests, that, in the case of Warren Hastings, the House of Commons did hear the accused, and did permit him to produce testimony, before they voted an impeachment against him. But this was only a single instance. That course might have been adopted, because Mr. Burke, merely as an individual Member of the House, had risen in his place, and moved the impeachment. Whether he was correct in this conjecture or not, it was certain there had been no case of an impeachment by this House, in which so much indulgence was granted, as had been allowed to the accused upon the present occasion. He was permitted to furnish the committee with a written explanation of his conduct, and his request that he might cross-examine the witnesses was promptly granted.

Mr. Ralph I. Ingersoll, of Connecticut, confessed that this was, in a great measure, a new case to him. The only one that he had ever before witnessed was that in which charges, through a newspaper of this district, had been brought against the Vice-President about three years ago. That officer had presented these charges to the House, as the grand inquest of the nation, and requested an inquiry. A committee had been appointed to investigate them; and, before that committee, a friend of the Vice-President had been permitted to appear and represent him throughout the whole investigation. Witnesses, also, had been examined on the part of the accused. How it had been in the case of Judge Chase, or of Judge Pickering, from New Hampshire, he did not recollect; but he well recollected that witnesses in favor of the Vice-President had been examined, as well as against him, and that his representative had been allowed to be present before the committee through every stage of that examination. The committee at that time took some pains to ascertain what was the proper mode of proceeding, and they became satisfied that the party accused had, in these preliminary proceedings, a right to be thus heard.

Mr. Spencer Pettis, of Missouri, said that the practice in cases of impeachment, so far as regarded the proceedings of this House, was now to be settled; for it was obvious that it had not yet been settled by precedent. Gentlemen had, indeed, spoken of the case of Judge Chase; but that case had no application to the present one as it now stands. Judge Chase did not ask to make his defense before this House, nor did he ask either to cross-examine witnesses on the part of the Government, or to have an examination of his own witnesses. As the present question was not then raised, that case can form no precedent to govern in this instance.

Mr. Pettis also went on to cite the investigations of the conduct of Mr. John C. Calhoun, as Secretary of War, and of Secretary of the Treasury William H. Crawford. In both investigations the accused had been permitted to have witnesses examined before the committees. Both these gentlemen were charged with high misdemeanors, and the charges had been preferred in times of great political excitement.

Mr. James Strong, of New York, said that, from the little examination he had been able to give to this subject, he had come to the conclusion that the present proceedings should be strictly ex parte, rigidly

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so. It had been said by the gentleman from Massachusetts [Mr. Everett] that the committee had departed somewhat from this line. It was true that they had deviated from it in a slight degree, but the departure was not such as to warrant the House in taking the other step which was now requested. There was a very material difference between hearing the party accused and hearing his witnesses. The Members of the House were not judges to try or to condemn the accused. It was true that the matters in this testimony might not be such as to mix themselves up with party politics; but suppose that it were proposed to impeach a political man of high standing, and that the witnesses were brought to the bar of the House, he put it to every man to say whether the safety of the country did not require that in such cases politics should be thoroughly excluded from that tribunal. And how could this be done but by keeping the proceedings strictly ex parte? Compaints had been made that the committee had not reported articles of impeachment; the case had been referred to them for no such purpose; their duty had been simply to ascertain facts. The House did not want even their opinions; it wanted the facts only, and on one side. What the House had to decide was, whether the testimony did or did not contain matter to warrant an impeachment. If it did, then the House would say the party should be impeached, and the next step would be to appoint a committee to frame the articles. These would be reported to the House, and, if they were agreed upon, then managers would be appointed to conduct the trial before the Senate. It struck him that the safest course would be to keep the proceedings as near ex parte as possible.

Finally the memorial was ordered to be laid on the table for printing, and was not referred to the Committee of the Whole.

On April 7,[11] Mr. Pettis proposed a resolution which, after modifications, read as follows:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be permitted, at any time, until Wednesday next at 12 o'clock, to make to this House any written or oral argument on the law or matters of fact, now in evidence before the House, he may think proper in answer to the charges preferred against him by Luke E. Lawless, esq., which charges have been reported on by the Committee on the Judiciary.

Mr. William Drayton, of South Carolina, moved to strike out the words "or oral." He said that in making the motion he had no intention of preventing the individual concerned from availing himself of the full benefit of what the resolution proposed to grant to him, but had been influenced by the consideration that, if his exposition should be made in writing all the Members of the House would have an opportunity of examining it; but if made orally it would be impossible that all the Members should distinctly hear it, and, if they did, they would probably not retain the substance of it distinctly in their memories. This was one reason which actuated him. Another was that, in his opinion, ill consequences would be likely to arise from the personal appearance of the memorialist before the House. He might aver that a material fact could be established by testimony incorrectly or imperfectly referred to in the report of the committee, and ask leave to introduce it fully. Should his application be rejected, he might regard

[11] House Journal, p. 513; Debates, p. 746–753.

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the permission to be heard as illusory. Should his application be acceded to, they would be drawn into a trial of the cause.

The amendment was disagreed to by the House.

On behalf of the resolution, Mr. Pettis said that he had examined the precedents since 1640 and had found none against the proposed action.

Mr. Buchanan said that he had examined the British precedents, and found that in several cases the party had been admitted to the floor of the House of Commons simply to make an argument on the testimony which had been previously given to the House. This was the utmost extent of the privilege so far as he had examined, except in a single instance—that of Warren Hastings. He should make no objection to a mere permission to make an exposition of the law and an argument upon the facts as they appeared in the testimony already taken.

Mr. William Drayton, of South Carolina, drew a distinction between this House and the House of Commons. This House had no other inquisitorial authority than was expressly delegated to it by the Constitution. The House of Commons, on the other hand, was the "grand inquest" of the nation. It may even supersede the courts in cases of individual misdemeanors, as in the case of Alice Pierce, Sir John Fenwick, etc. British precedents were more likely to mislead than assist. The Constitution simply gives this House power to decide whether the case shall be tried before another body. The House could not itself try the case. Unless it should confine itself to what was termed ex parte evidence there would be no bounds to the inquiry.

Mr. Buchanan said his desire was that the House might establish such a precedent as should protect the interests of the accused in all future time. The Judiciary Committee had Judge Chase's trial before them. The mode of proceeding in that trial they considered as strictly proper and delicate. The committee in that case were directed to report their opinion on the charges against Judge Chase, which had been made on the floor of the House. For the purpose of enabling them to do so they procured all the testimony in their power. This they reported to the House, together with a simple statement of their own opinion upon it—nothing else. And why? He presumed that, as it was a judicial proceeding, they wished to leave every gentleman to decide for himself on the naked testimony. They considered one Member as competent to decide as another. Their report was referred to the Committee of the Whole House on the State of the Union, and there it was discussed. If in this case the Committee of the Whole should concur with the Judiciary Committee in their view of the case, then the House would appoint a committee to draft articles of impeachment. These articles would be considered and adopted by the House. Until after this second decision the accused would not be called upon to answer. As to the course pursued by the Pennsylvania house in a similar case, it had never met his approval.

The House agreed to the resolution proposed by Mr. Pettis without division.

Judge Peck did not avail himself of the permission to come before the House and make an oral statement; but on April 14 [12] the Speaker laid before the House a letter from Judge Peck transmitting his "ex-

[12] House Journal, p. 532; Debates, p. 789; House Report, No. 359.

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planation in answer to the charges," with documents referred to in the answer.

The House decided that the explanation should be read, but after a time the reading was suspended and the statement alone having been ordered printed, it was, with the documents, referred to the Committee of the Whole House on the state of the Union.

2367. Peck's impeachment, continued.

After consideration in Committee of the Whole, the House concurred in the proposition to impeach Judge Peck.

The impeachment of Judge Peck was only for "high misdemeanors in office."

Forms and ceremonies of carrying the impeachment of Judge Peck to the Senate.

The impeachment of Judge Peck was carried to the Senate by a committee of two.

After discussing precedents the Senate appointed a committee to consider the message impeaching Judge Peck.

The Blount precedent for requiring bonds of the respondent was discussed adversely in the Peck case.

Mr. Senator Benton was excused from voting on a preliminary question in the Peck impeachment.

On April 21, 22, 23, and 24 [13] the Committee of the Whole House on the state of the Union considered the question of impeachment, the debate being on a resolution proposed, as follows, by Mr. Buchanan:

Resolved, That James H. Peck, judge of the district court of the United States for the district of Missouri, be impeached of high misdemeanors in office.

Mr. Edward Everett, of Massachusetts, moved to amend the resolution by striking all out after the word "*Resolved*" and inserting as follows:

That though, on the evidence now before it, this House does not approve of the conduct of James H. Peck, judge of the district court of the United States for the district of Missouri, in his proceeding by attachment against Luke E. Lawless for alleged contempt of the said court, yet there is not sufficient evidence of evil intent to authorize the House to impeach the said judge of high misdemeanors in office.

This amendment was disagreed to.

The resolution was then agreed to, ayes 113, negative not taken.

The Committee of the Whole then rose and reported the resolution to the House, whereupon the question was put:

Will the House concur with the Committee of the Whole House [on the state of the Union] in the adoption of the said resolution?

and there were ayes 123, nays 49.[14]

So the resolution was agreed to.

It was then [15]—

Ordered, That Mr. Buchanan and Mr. Henry R. Storrs, of New York, be appointed a committee to go to the Senate and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of the United States for

[13] House Journal, pp. 558, 560, 564, 564; Debates, pp. 810, 814, 818.

[14] It was stated later by Mr. Manager Spencer, in his argument to the high court, that this decision was not at all on party lines. (See Report of the trial of James H. Peck, p. 289.)

[15] House Journal, pp. 566, 567; Debates, p. 819.

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the district of Missouri, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same.

***Ordered,* That the committee do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.**

On motion of Mr. Henry R. Storrs, of New York—

***Resolved,* That a committee be appointed to prepare and report to this House articles of impeachment against James H. Peck, district judge of the United States for the district of Missouri, for high misdemeanors in his said office.**

And Mr. Buchanan, Mr. Storrs, of New York; Mr. George McDuffie, of South Carolina; Mr. Ambrose Spencer, of New York, and Mr. Charles A. Wickliffe, of Kentucky, were appointed the said committee.

All of this committee were from among those who had voted in favor of the impeachment.

On April 26 [16]—

***Ordered,* That James H. Peck have leave to withdraw his memorials and the documents which accompanied the same.**

On April 26,[17] in the Senate Messrs. Buchanan and Storrs, Members of the House of Representatives, with a message from that House, were announced, and, having taken the seats assigned them,

The President [18] informed them that the Senate was ready to receive any communication they might have to make.

Mr. Buchanan then rose and said:

We are commanded, in the name of the House of Representatives and of all the people of the United States, to impeach James H. Peck, judge of the district court of Missouri, of high misdemeanors in office, and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and we do demand that the Senate take order for the appearance of the said James H. Peck to answer to said impeachment.

Messrs. Buchanan and Storrs, having retired,

Mr. Littleton W. Tazewell, of Virginia, rose and said that in looking over similar cases for the purpose of ascertaining what would be the proper course of proceeding, he discovered that messages, similar in most particulars to the one just received, had been presented to the Senate in three cases. The first was the case of Blount, one of the Members of this body; the next was that of John Pickering, judge of the district court of New Hampshire, and the third was that of Judge Chase. Upon each of these cases there seemed to have been some anxious consideration in order to adopt the course most proper to be pursued. Mr. Tazewell would state in what the proceedings in these cases differed. The case of Mr. Blount, being the first of the kind that had ever occurred, presented so anomalous a practice that it never could be referred to as a precedent. The other two were consistent with the general principles of law and justice. From these it seems that it had been settled that when the House of Representatives informed the Senate that they were about to present articles of impeachment a select committee was appointed to take the subject into consideration and report what measures were proper to be taken. He would read for the information of the Senate the cases as they occurred.

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[16] House Journal, p. 670.
[17] Senate Journal, p. 269; Debates, pp. 383, 384.
[18] John C. Calhoun, of South Carolina, Vice-President, and President of the Senate.

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Mr. Tazewell, having read the precedents in the case of Blount, Pickering, and Chase, said that as to the precedent in the case of Blount the idea of calling upon an individual to enter into a recognizance to appear at no named time at no given place to answer charges not yet set forth in articles of impeachment was so manifestly contrary to justice that the Senate itself seemed to have abandoned it. Therefore he concluded that the Blount case would not be considered a fit precedent, so he moved the following resolution to the message:

Resolved, That it be referred to a select committee, to consist of three members, to consider and report thereon.

This resolution was agreed to.

The Senate then proceeded to ballot for the committee.

Mr. Thomas H. Benton, of Missouri, asked to be excused from voting on the question, and the question being taken he was excused.

Then the committee were chosen, as follows: Messrs. Tazewell, Samuel Bell, of New Hampshire, and Daniel Webster, of Massachusetts.

On the same day, in the House,[19] Mr. Buchanan reported that, in obedience to the order of the House, they had been to the Senate, and in the name of the House of Representatives and of all the people of the United States had impeached James H. Peck, judge, etc., of high misdemeanors in office; that the committee had acquainted the Senate that the House of Representatives would, in due time, exhibit particular articles of impeachment against the said James H. Peck and make good the same, and that the committee had demanded that the Senate take order for the appearance of the said James H. Peck to answer to the said impachment.

On April 27,[20] in the Senate, Mr. Tazewell, from the Select Committee appointed on the subject, made the following report; which was concurred in by the Senate:

Whereas the House of Representatives on the 26th of the present month, by two of their members, Messrs. Buchanan and Storrs, of New York, at the bar of the Senate, impeached James H. Peck, judge of the district court of the United States for the district of Missouri, of high misdemeanors in office, and acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said James H. Peck, to answer the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

And the committee further recommended to the Senate that the Secretary be directed to notify the House of Representatives of the foregoing resolution.

Accordingly, after the report had been concurred in, it was

Ordered, That the Secretary notify the House of Representatives accordingly.

On the same day the message was communicated to the House.[21]

2368. Peck's impeachment continued.

The respondent in the Peck impeachment communicated with the Senate as to the trial before articles had been presented.

The article of impeachment against Judge Peck was considered in Committee of the Whole before being agreed to by the House.

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[19] House Journal, p. 671.
[20] Senate Journal, p. 271; Debates, p. 385.
[21] House Journal, pp. 573, 574.

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All of the committee who framed the article in the Peck case had voted for the impeachment. (Footnote.)

The article in the Peck impeachment appears in the House Journal on the day of its adoption.

The managers of the Peck impeachment were chosen by ballot, a majority vote being required for election.

Instance wherein the Journal recorded the names of the tellers on a vote by ballot.

Form of resolutions providing for carrying to the Senate the article impeaching Judge Peck.

All the managers in the Peck trial were of those who had voted for impeachment.

On April 28 [22] the Vice-President communicated to the Senate two letters from Judge Peck, notifying the Senate of his intention to go to Baltimore, where he should remain some days; and requesting that, in the arrangement of the Senate chamber preparatory to his impeachment, a seat might be assigned him by which he might avoid facing the windows. The letters, having been read, were laid on the table.

On April 29,[23] Mr. Buchanan, from the committee appointed for the purpose, reported an article, to be exhibited to the Senate of the United States in behalf of themselves and of all the people of the United States, against Judge Peck, a judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him. It was laid on the table and directed to be printed.

On April 30,[24] on motion of Mr. Buchanan,

Ordered, That the article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, be committed to the Committee of the Whole House on the State of the Union.

On May 1,[25] the article was considered in Committee of the Whole, and, after a verbal amendment, was reported favorably to the House.

And the question was then put:

Will the House adopt the said article, as its article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri?

And it passed in the affirmative, without division.

The article [26] appears in full in the Journal of the House of this date.

On motion of Mr. Buchanan,

Resolved, That five managers be appointed, by ballot, to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, on the part of this House.

The House proceeded to the appointment of five managers, by ballot, when the following gentlemen received a majority of votes, and were appointed, viz: James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; George McDuffie of South Carolina; Ambrose Spencer, of New York, and Charles Wickliffe, of Kentucky.

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[22] Senate Journal, p. 272.
[23] House Journal, p. 584; Debates, p. 863.
[24] House Journal, p. 588; Debates, p. 866.
[25] House Journal, pp. 591–596; Debates, p. 869.
[26] As shown above, the committee which framed this article was composed entirely of Members who voted for the impeachment.

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The first four were elected on the first ballot. But four ballots were taken before a majority was given for Mr. Wickliffe.

The Journal records that Messrs. William McCoy, of Virginia, Daniel H. Miller, of Pennsylvania, and Robert Desha, of Tennessee, were appointed tellers to examine the ballots on the vote.

The managers were the same as the committee appointed to prepare the article of impeachment; and all had been favorable to the impeachment.

On motion of Mr. Buchanan, it was

Resolved, That the article agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against James H. Peck, in maintenance of their impeachment against him for high misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

On motion of Mr. Buchanan, it was

Resolved, That a message be sent to the Senate, to inform them that this House have appointed managers to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, and have directed the said managers to carry to the Senate the article agreed upon by this House, to be exhibited in maintenance of their impeachment against the said James H. Peck, and that the Clerk of this House do go with said message.

2369. Peck's impeachment continued.

The message announcing to the Senate that an article impeaching Judge Peck would be presented gave the names of the managers.

The Senate adopted a rule prescribing ceremonies for receiving as a court the articles impeaching Judge Peck.

Form of oath prescribed for Senators in the Peck trial.

Form of proclamation of the Sergeant-at-Arms when articles of impeachment against Judge Peck were to be presented.

On May 3,[27] in the Senate, the Clerk of the House delivered this message:

Mr. President, I am directed to inform the Senate that the House of Representatives have appointed Mr. Buchanan, of Pennsylvania, etc. (naming the others), managers to conduct the impeachment against James H. Peck, judge of, etc.; and have directed the said managers to carry to the Senate the articles argreed upon by the House to be exhibited in maintenance of their impeachment against the said James H. Peck.

The message having been delivered and read, on motion by Mr. Tazewell, it was

Resolved, That at 12 o'clock to-morrow the Senate will resolve itself into a court of impeachment, at which time the following oath or affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, viz:

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, I will do impartial justice according to law."

Which court of impeachment being thus formed will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment, in the name of themselves and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the

[27] Senate Journal, p. 282; Debates, p. 405.

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purposes aforesaid; and that the Secretary of the Senate lay this resolution before the House of Representatives.

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against James H. Peck, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri." After which the articles shall be exhibited and the President of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House of Representatives by message.[28]

On May 4[29] the Senate resolved itself into a high court of impeachment,[30] and the Secretary administered the prescribed oath to the Vice-President, who then administered it in turn to the Senators.

The managers on the part of the House of Representatives appeared and were admitted; and Mr. Buchanan, their chairman, having announced that they were the managers instructed by the House of Representatives to exhibit a certain article of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, they were requested by the Vice-President to take seats assigned them within the bar; and the Sergeant-at-Arms was directed to make proclamation in the words following:

Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri.

2370. Peck's impeachment, continued.

The article of impeachment against Judge Peck.

The article of impeachment in the Peck case was signed by the Speaker and attested by the Clerk.

The article of impeachment in the Peck case was read by the chairman of the managers, and appears in full on the journal of the trial.

Having laid the article impeaching Judge Peck on the Senate table, the managers returned and reported verbally to the House.

The article of impeachment against Judge Peck having been presented, the Senate ordered a writ of summons to issue, and informed the House thereof.

After which the managers rose, and Mr. Buchanan, their chairman, read the following article, which appears in full in the journal of the impeachment:

Article exhibited by the House of Representatives of the United States, in the name of themselves, and of all the people of the United States, against James H. Peck, judge of the district court of the United States for the district of Missouri, in maintenance and support of their impeachment against him for high misdemeanors in office.

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[28] House Journal, p. 603.

[29] Senate Impeachment Journal, second session Twenty-first Congress, pp. 240–243; Debates, pp. 411–413.

[30] During this trial the court is described by the singular number "impeachment." In former trials the word has been "impeachments."

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ARTICLE

That the said James H. Peck, judge of the district court of the United States for the district of Missouri, at a term of the said court, holden at St. Louis, in the State of Missouri, on the 4th Monday in December, 1825, did, under and by virtue of the power and authority vested in the said court, by the act of the Congress of the United States, entitled "An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims," approved on the 26th day of May, 1824, render a final decree of the said court in favor of the United States, and against the validity of the claim of the petitioners, in a certain matter or cause depending in the said court, under the said act, and before that time prosecuted in the said court, before the said judge, by Julie Soulard, widow of Antoine Soulard, and James G. Soulard, Henry G. Soulard, Eliza Soulard, and Benjamin A. Soulard, children and heirs at law of the said Antoine Soulard, petitioners against the United States, praying for the confirmation of their claim, under the said act, to certain lands situated in the said State of Missouri; and the said court did, thereafter, on the 30th day of December, in the said year, adjourn to sit again on the third Monday in April, 1826.

And the said petitioners did, and at the December term of the said court, holden by and before the said James H. Peck, judge as aforesaid, in due form of law, under the said act, appeal against the United States from the judgment and decree so made and entered in the said matter, to the Supreme Court of the United States; of which appeal, so made and taken in the said district court, the said James H. Peck, judge of the said court, had then and there full notice. And the said James H. Peck, after the said matter or cause had so been duly appealed to the Supreme Court of the United States, and on or about the 30th day of March, 1826, did cause to be published, in a certain public newspaper, printed at the city of St. Louis, called "The Missouri Republican," a certain communication, prepared by the said James H. Peck, purporting to be the opinion of the said James H. Peck, as judge of the said court, in the matter or cause aforesaid, and purporting to set forth the reasons of the said James H. Peck, as such judge, for the said decree; and that Luke Edward Lawless, a citizen of the United States, and an attorney and counsellor at law in the said district court, and who had been of counsel for the petitioners in the said court, in the matter aforesaid, did, thereafter, and on or about the 8th day of April, 1826, cause to be published in a certain other newspaper, printed at the city of St. Louis, called "The Missouri Advocate and St. Louis Enquirer," a certain article signed "A Citizen," and purporting to contain an exposition of certain errors of doctrine and fact alleged to be contained in the opinion of the said James H. Peck, as before that time so published, which publication by the said Luke Edward Lawless was to the effect following, viz:

"*To the Editor:*

"SIR: I have read, with the attention which the subject deserves, the opinion of Judge Peck on the claim of the widow and heirs of Antoine Soulard, published in the Republican of the 30th ultimo. I observe that, although the judge has thought proper to decide against the claim, he leaves the grounds of his decree open for further discussion.

"Availing myself, therefore, of this permission, and considering the opinion so published to be a fair subject of examination to every citizen who feels himself interested in, or aggrieved by, its operation, I beg leave to point the attention of the public to some of the principal errors which I think I have discovered in it. In doing so, I shall confine myself to little more than an enumeration of those errors, without entering into any demonstration or developed reasoning on the subject. This would require more space than a newspaper allows, and, besides, is not, as regards most of the points, absolutely necessary.

"Judge Peck, in this opinion, seems to me to have erred in the following assumptions, as well of fact as of doctrine:

"1. That, by the ordinance of 1754, a subdelegate was prohibited from making a grant in consideration of services rendered or to be rendered.

"2. That a subdelegate in Louisiana was not a subdelegate, as contemplated by the said ordinance.

"3. That O'Reily's regulations, made in February, 1770, can be considered as demonstrative of the extent of the granting power of either the governor-general or the subdelegates, under the royal order of August, 1790.

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"4. That the royal order of August, 1770 (as recited or referred to in the preamble to the regulations of Morales, of July, 1799), related exclusively to the governor-general.

"5. That the word 'mercedes,' in the ordinance of 1754, which, in the Spanish language, means 'gifts,' can be narrowed, by anything in that ordinance, or in any other law, to the idea of a grant to an Indian, or a reward to an informer, and much less to a mere sale for money.

"6. That O'Reily's regulations were in their terms applicable, or ever were in fact applied to, or published in, upper Louisiana.

"7. That the regulations of O'Reily have any bearing on the grant to Antoine Soulard, or that such a grant was contemplated by them.

"8. That the limitations to a square league of grants to new settlers in Opelousas, Attakapas, and Natchitoches (in eighth article of O'Reily's regulations) prohibits a larger grant in upper Louisiana.

"9. That the regulations of the governor-general, Gayoso, dated 9th September, 1797, entitled 'Instructions to be observed for the admission of new settlers,' prohibit, in future, a grant for services, or have the effect of annulling that to Antoine Soulard, which was made in 1796, and not located or surveyed until February, 1804.

"10. That the complete titles made by Gayoso are not to be referred to as affording the construction made by Gayoso himself, of his own regulations.

"11. That, although the regulations of Morales were not promulgated as law in upper Louisiana, the grantee in the principal case was bound by them, inasmuch as he had notice, or must be presumed, 'from the official station which he held,' to have had notice, of their terms.

"12. That the regulations of Morales 'exclude all belief that any law existed under which a confirmation of the title in question could have been claimed.'

"13. That the complete titles (produced to the court) made by the governor-general, or the intendant-general, though based on incomplete titles, not conformable to the regulations of O'Reily, Gayoso, or Morales, afford no inference in favor of the power of the lieutenant-governor, from whom these incomplete titles emanated, and must be considered as anomalous exercises of power in favor of individual grantees.

"14. That the language of Morales himself, in the complete titles issued by him, on concessions made by the lieutenant-governor of upper Louisiana, anterior to the date of his regulations, ought not to be referred to as furnishing the construction which he, Morales, put on his own regulations.

"15. That the uniform practice of the subdelegates, or lieutenant-governor of upper Louisiana, from the first establishment of that province to the 10th March, 1804, is to be disregarded as proof of law, usage, or custom therein.

"16. That the historical fact that nineteen-twentieths of the titles to lands in upper Louisiana were not only incomplete but not conformable to the regulations of O'Riley, Gayoso, or Morales at the date of the cession to the United States, affords no inference in favor of the general legality of those titles.

"17. That the fact that incomplete concessions, whether floating or located, were, previous to the cession, treated and considered by the Government and population of Louisiana as property, salable, transferable, and the subject of inheritance and distribution ab intestato, furnishes no inference in favor of those titles, or to their claim to the protection of the treaty of cession, or of the law of nations.

"18. That the laws of Congress heretofore passed in favor of incomplete titles furnish no argument or protecting principle in favor of those titles of a precisely similar character, which remain unconfirmed.

"In addition to the above, a number of other errors, consequential on those indicated, might be stated. The judge's doctrine as to the forfeiture which he contends is inflicted by Morale's regulations, seems to me to be peculiarly pregnant with grievous consequences. I shall, however, not tire the reader with any further enumeration, and shall detain him only to observe, by way of conclusion, that the judge's recollection of the argument of the counsel for the petitioner, as delivered at the bar, differs materially from what I can remember, who also heard it. In justice to the counsel I beg to observe that all that I have now submitted to the public has been suggested by that argument as spoken, and by the printed report of it, which is even now before me.

"A Citizen."

And the said James H. Peck, judge as aforesaid, unmindful of the solemn duties of his station, and that he held the same, by the Constitution of the United States, during good behavior only, with intention wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke Edward Lawless, under

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color of law, did, thereafter, at a term of the said district court of the United States for this district of Missouri, begun and held at the city of St. Louis, in the State of Missouri, on the 3d Monday in April, 1826, arbitrarily, oppressively, and unjustly, and under the further color and pretense that the said Luke Edward Lawless was answerable to the said court for the said publication signed "A Citizen," as for a contempt thereof, institute, in the said court, before him, the said James H. Peck, judge as aforesaid, certain proceedings against the said Luke Edward Lawless, in a summary way, by attachment issued for that purpose by the order of the said James H. Peck, as such judge, against the person of the said Luke Edward Lawless, touching the said pretended contempt, under and by virtue of which said attachment the said Luke Edward Lawless was, on the 21st day of April, 1826, arrested, imprisoned, and brought into the said court, before the said judge, in the custody of the marshal of the said States; and the said James H. Peck, judge as aforesaid, did, afterwards, on the same day, under the color and pretenses aforesaid, and with the intent aforesaid, in the said court, then and there, unjustly, oppressively, and arbitrarily, order and adjudge that the said Luke Edward Lawless, for the cause aforesaid, should be committed to prison for the period of twenty-four hours, and that he should be suspended from practicing as an attorney or counsellor at law in the said district court for the period of eighteen calendar months from that day, and did then and there further cause the said unjust and oppressive sentence to be carried into execution; and the said Luke Edward Lawless was, under color of the said sentence, and, by the order of the said James H. Peck, judge, as aforesaid, thereupon suspended from practicing as such attorney or counsellor in the said court for the period aforesaid, and immediately committed to the common prison in the said city of St. Louis, to the great disparagement of public justice, the abuse of judicial authority, and to the subversion of the liberties of the people of the United States.

And the House of Representatives, by protestation, saying to themselves the liberty of exhibiting, at any time hereafter, any further articles, or other accusations or impeachment, against the said James H. Peck, and also of replying to his answers which he shall make unto the article herein preferred against him, and of offering proof to the same, and every part thereof, and to all and every other articles, accusation, or impeachment, which shall be exhibited by them as the case shall require, do demand that the said James H. Peck may be put to answer the misdemeanors herein charged against him, and that such proceedings, examinations, trials, and judgments, may be thereupon had and given, as may be agreeable to law and justice.

A. STEVENSON,
Speaker of the House of Representatives, United States.

Attest:
M. ST. CLAIR CLARKE,
Clerk House of Representatives, United States.

The Vice-President then informed the managers that the Senate would take proper order thereon, of which the House of Representatives should have due notice.

The managers, by their chairman, delivered the article of impeachment at the table of the Secretary, and then withdrew.

On motion by Mr. Tazewell, it was

Resolved, That the Secretary be directed to issue a summons, in the usual form, to James H. Peck, judge of the district court of the United States for the district of Missouri, to answer a certain article of impeachment exhibited against him by the House of Representatives on this day; that the said summons be returnable here on Tuesday next, the 11th instant, and be served by the Sergeant-at-Arms, or some person to be deputed by him, at least three days before the return day thereof; and that the Secretary communicate this resolution to the House of Representatives.

On motion by Mr. Tazewell,

The court then adjourned to Tuesday next at 12 o'clock.

On the same day, in the House, the managers reported: [31]

[31] House Journal, p. 605; Debates, p. 872.

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That they did, this day, carry to the Senate, then in session as a high court of impeachment, the article of impeachment agreed to by this House on the 1st instant, and that they were informed that they would take proper measures relative to the said impeachment, of which the House would be duly notified.

A little later, on the same day, the Secretary of the Senate communicated [32] a message:

IN SENATE OF THE UNITED STATES,
HIGH COURT OF IMPEACHMENT,
Tuesday, May 4, 1830.

The United States. *v.* James H. Peck.

Resolved, That the Secretary be directed to issue a summons, etc. [here follows the text of the resolution already given above]

Attest:

WALTER LOWRIE, *Secretary.*

2371. Peck's impeachment continued.

Form of proclamation of Sergeant-at-Arms enjoining silence at the opening of the high court of impeachment for the Peck trial.

Form used by the Sergeant-at-Arms in calling Judge Peck to appear and answer the article.

Form of return made by the Sergeant-at-Arms in the Peck trial, and oath taken by him at the time.

Ceremonies at the appearance of Judge Peck in response to the writ of summons.

Judge Peck appeared in person, attended by counsel, in answer to the writ of summons.

Having appeared, Judge Peck asked time to prepare his answer, accompanying the request with an affidavit.

The Senate declined to allow Judge Peck until the next session of Congress to file his answer, and set an earlier date.

The answer of Judge Peck to the article of impeachment was ordered to be filed with the Secretary.

The Senate notified the House of the date fixed for Judge Peck to file his answer.

On May 11,[33] the high court of impeachment was opened by proclamation of silence by the Sergeant-at-Arms, as follows:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

The return of the Sergeant-at-Arms of the summons issued to James H. Peck was read, as follows:

I, Mountjoy Bayly, Sergeant-at-Arms of the Senate of the United States, in obedience to the within summons, to me directed, did proceed to Barnum's Hotel, in the city of Baltimore, on Thursday, the 6th instant, and did then and there deliver to, and leave with, the within-named James H. Peck a true copy of the within writ of summons and a true copy of the precept thereon indorsed, and did show him both.

MOUNTJOY BAYLY.

WASHINGTON, *May 8, 1830.*

The Secretary then administered the following oath to the Sergeant-at-Arms:

You, Mountjoy Bayly, Sergeant-at-Arms to the Senate of the United States, do swear that the return made and subscribed by you upon the process issued on the

[32] House Journal, p. 606.
[33] Senate Impeachment Journal, second session Twenty-first Congress, pp. 244–248; Debates, p. 432.

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4th day of May, instant, by the Senate of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri, is truly made, and that you have performed said services as therein described. So help you God.

Proclamation was then made as follows:

Oyez, oyez, oyez. James H. Peck, judge of the district court of the United States for the district of Missouri, come forward and answer the article of impeachment exhibited against you by the House of Representatives.

Whereupon James H. Peck appeared at the bar, attended by William Wirt, as his counsel, and they were seated within the bar.

The Vice-President informed Judge Peck that the court was ready to receive his answer.

Judge Peck rose and addressed the Senate as follows:

Mr. President: I appear, in obedience to a summons from this honorable court, to answer an article of impeachment exhibited against me by the honorable the House of Representatives; and I have a motion to make, which I request may be done by my counsel.

The Vice-President having signified the willingness of the court to receive the motion,

Mr. Wirt rose and read a letter addressed to the President of the Senate and signed by the respondent, in which were set forth the necessity of time to prepare a defense, and in which was also included a motion, respectfully submitted:

1. That a reasonable time may be allowed me to prepare my answer and plea; and, for this purpose, I ask, until the 25th day of the present month.

2. That, after my answer and plea shall be filed, process for witnesses may be awarded to me, and a reasonable time may be allowed to collect my witnesses and proofs from the State of Missouri.

The communication also referred to an accompanying affidavit. In this affidavit James H. Peck made oath that certain named persons were material witnesses for him, that there were other witnesses not named who would be material, and that there were certain public records needful to his defense; and that in order to produce these the delay asked for was not too much. He further made oath that his application was not for purposes of delay.

The reading having concluded, Mr. Daniel Webster, of Massachusetts, then submitted the following order:

***Ordered*, That James H. Peck file his answer and plea with the Secretary of the Senate to the article of impeachment exhibited against him by the House of Representatives, on or before the second Monday of the next session of Congress.**

On motion of Mr. George M. Bibb, of Kentucky, this order was amended by striking out all after the words "on or before" and inserting "the 25th day of the present month;" and as amended the order was agreed to.

It was further—

***Ordered*, That the Secretary notify the foregoing order to the House of Representatives and to James H. Peck.**

On the same day this message was duly communicated to the House.[34]

[34] House Journal, p. 625.

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2372. Peck's impeachment, continued.

In the Peck trial new rules were not adopted, the rules framed in the Chase trial being considered as operative.

On May 11,[35] also, the Senate (not the high court of impeachment) agreed to the following:

Ordered, That the Secretary of the Senate direct copies of the rules of proceedings, prescribed in cases of impeachment, to be printed for the use of the Members, and laid on their tables on the first day of the next session of the court; and also that copies be furnished to the managers of the impeachment in the case of James H. Peck and to the accused and his counsel.

The rules referred to are those agreed upon at the trial of Samuel Chase. They are printed as a footnote in the Journal of the impeachment; but they were not acted on in any way by the court at this time, being treated as existing rules.[36]

2373. Peck's impeachment continued.

In the Peck trial the House decided to attend its managers at the presentation of the answers but not during the trial.

On May 25,[37] in the House, Mr. Storrs, of New York, observed that, as the Senate would meet to-day as a court of impeachment for the purpose of receiving the answer of the respondent, Judge Peck, it was indispensable that the House come to some order immediately on the subject. He therefore moved a resolution that the House would, in Committee of the Whole, attend the Senate during the trial of James H. Peck. Mr. Storrs argued that the resolution was in accordance with former usage and that the House should be present during every day of the trial. The appointment of managers was not intended to dispense with the presence of the House. The managers could take no step without consulting the House, which must, therefore, be present.

On the other hand, Mr. Pettis and Mr. Joel B. Sutherland, of Pennsylvania, insisted that the presence of the managers alone would be sufficient, and that if the House were to attend daily the other business would suffer. Mr. Sutherland said it would be very proper to go to the Senate today, and be present at the opening of the court for the impeachment, and receiving the answer of the accused; but afterwards, unless some very pressing occasion should require it, the presence of the House would be unnecessary. The object in appointing managers was to leave it to them to conduct the impeachment. He cited Jefferson's Manual to sustain his opinion, and moved to modify the resolution so as to provide that the House would attend this day.

In accordance with this suggestion, the resolution was modified and agreed to as follows:

Resolved, That this House will, this day, at such hour as the Senate shall appoint, resolve itself into Committee of the Whole, and attend in the Senate on the trial of the impeachment there pending of James H. Peck, judge of the district court of the United States for the district of Missouri.

2374. Peck's impeachment continued.

Arrangement of the Hall and ceremonies at the presentation of Judge Peck's answer.

Form of answer of Judge Peck in answer of the article of impeachment.

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[35] Senate Journal, first session Twenty-first Congress, p. 296.
[36] Senate Impeachment Journal, second session Twenty-first Congress, pp. 248–250.
[37] House Journal, p. 714; Debates, p. 1134.

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Judge Peck, in his plea, declared that the acts charged were justified by the law of the land.

The answer in the Peck case was read by counsel for respondent and then delivered to the Secretary.

Form of journal entry describing the attendance of the House in Committee of the Whole at the Peck trial.

The House was furnished by the court with a copy of Judge Peck's answer.

On the same day, May 25,[38] in the high court of impeachment, at the hour of 12 o'clock, the court was opened by proclamation in the usual form.

On motion by Mr. Webster, it was

Ordered, That the Secretary give notice to the House of Representatives that the Senate are now in their Chamber and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and that seats are provided for the accommodation of the Members of the House of Representatives.

And this notice was duly received by the House.[39]

In the high court seats had been arranged on the right and left of the Chair, for the accommodation of the Senators, and their seats assigned to the managers and Members of the House of Representatives, and the accused and his counsel.

Judge Peck appeared, accompanied by William Wirt and Jonathan Meredith as his counsel, and they occupied seats assigned them to the right of the Chair.

The managers and Members of the House of Representatives appeared and took the seats usually occupied by the Senate.

The Vice-President then asked Judge Peck whether he was prepared to answer the article of impeachment exhibited against him.

Judge Peck replied that his answer and plea were prepared and desired that they might be read by his counsel.

The Vice-President asked Judge Peck whether the answer now to be made was to be considered as his final answer on which he intended to rely; and the judge having answered in the affirmative, the counsel was directed to proceed to read it.

Mr. Meredith read the answer (which occupied upward of two hours). In form the answer began as follows:

The answer of James H. Peck to the article of impeachment exhibited against him by the honorable House of Representatives of the United States.

The said James H. Peck, saving to himself all exceptions whatsoever to the said article and the charges therein contained, answers and says:

Here follows the answer in detail, and the conclusion:

In all which actions and doings of this respondent in the premises, he avers that he was supported and justified by the Constitution and laws of the land, and that he will be prepared to make good this averment at such time as this honorable court shall appoint.

And, solemnly denying the intention charged to him by the article of impeachment, "wrongfully and unjustly to oppress, imprison, and otherwise injure the said Luke E. Lawless, under color of law," and asserting, in the presence of the Supreme Searcher of Hearts, that in all that he did in the premises he was actuated by the purest sense of what he deemed a high official duty and was, as he believed and still confidently believes, well warranted and supported in every step

[38] Senate Impeachment Journal, second session Twenty-first Congress, pp. 249–326; Debates, pp. 455, 456.

[39] House Journal, p. 717.

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by the Constitution and laws of the land, this respondent, for plea to the said article of impeachment, saith that he is not guilty of any misdemeanor, as in and by said article is alleged, and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require.

JAMES H. PECK.

This answer, with sundry exhibits referred to therein, is spread on the Journal of the high court of impeachment. It was delivered to the Secretary of the Senate after the reading.

Mr. Storrs, in behalf of the managers, moved

That they have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent, which was agreed to.

On motion by Mr. Webster it was

Ordered, That when this court adjourn, it adjourn to meet again on the second Monday of the next session of Congress, at 12 o'clock, then to proceed with the said impeachment.

Mr. Wirt desired to know whether blank summons as for the attendance of witnesses would be allowed to the respondent.

The Vice-President replied that they would.

The court then adjourned to the second Monday of the next session of Congress.

The House Journal of this day has this entry: [40]

The House then, in pursuance of a resolution agreed to this day, resolved itself into a Committee of the Whole House, and proceeded in that capacity to the Senate Chamber, to attend the trial by the Senate of the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri; and, after sometime spent therein, the committee returned into the Chamber of the House; and the Speaker having resumed the Chair, Mr. P. P. Barbour, of Virginia, from the said Committee of the Whole, reported that the committee had, according to order, attended the trial by the Senate of the said impeachment; that the answer and plea of the said James H. Peck were delivered in their presence; that some progress was made in said trial, and that the Senate, sitting as a high court of impeachment, had adjourned to meet again on the second Monday of the next session of Congress, at 12 o'clock.

And on May 31 [41] the Congress adjourned.

2375. Peck's impeachment continued.

A recess of Congress intervened between the filing of the answer and the presentation of the replication in the Peck trial.

Form of replication to Judge Peck's answer and forms of resolutions providing for its presentation.

Senators elected after the beginning of an impeachment trial are sworn as in the case of other Senators.

At the next session of Congress the proceedings were resumed where they had ended at the preceding session.

On December 13,[42] 1830, in the House,

Mr. Buchanan, on behalf of the managers appointed to conduct the impeachment against Judge James H. Peck, submitted the following report:

The committee of managers appointed by the House of Representatives to conduct the impeachment against James H. Peck, judge of the district court of the United States for the district of Missouri, report that they have had under

[40] Page 717.
[41] House Journal, p. 812.
[42] Second session Twenty-first Congress, House Journal, pp. 47, 48; Debates, pp. 354, 355.

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consideration the answer of Judge Peck to the article of impeachment exhibited against him by the House, and recommend the adoption of the following replication thereto:

REPLICATION

By the House of Representatives of the United States to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited against him by the said House of Representatives.

The House of Representatives of the United States having considered the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment against him by them exhibited, in the name of themselves and of all the people of the United States, reply that the said James H. Peck is guilty in such manner as he stands impeached; and that the House of Representatives will be ready to prove their charges against him at such convenient time and place as shall be appointed for that purpose.

The replication being read was agreed to by the House.

Thereupon, on motion of Mr. Buchanan,

Resolved, That the foregoing replication be put into the answer and plea of the aforesaid James H. Peck on behalf of this House; and that the managers be instructed to maintain the said replication at the bar of the Senate, at such time as shall be appointed by the Senate.

Resolved, That a message be sent to the Senate to inform them that this House have agreed to a replication on their part to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the article of impeachment exhibited to the Senate against him by this House, and have directed the managers appointed to conduct the said impeachment to carry the said replication to the Senate, and to maintain the same at the bar of the Senate, at such times as shall be appointed by the Senate.

On the same day [43] the high court of impeachment was opened by proclamation,[44] and the President [45] administered the oath to Messrs. David J. Baker, of Illinois, and George Poindexter, of Mississippi, newly-elected Senators who had taken their seats at the first of the session.

On motion of Mr. Levi Woodbury, of New Hampshire,

Ordered, That the Secretary inform the House of Representatives that the Senate are in their public Chamber, and are ready to proceed on the trial of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri, and that seats are provided for the accommodation of the Members.

The message from the House of Representatives announcing that the managers had been directed to carry the replication was received.

The respondent, accompanied by Mr. Wirt and Mr. Meredith, his counsel, appeared at the bar of the Senate. They were conducted to seats, with a table before them, prepared for their convenience.

In a few minutes the managers to conduct the impeachment on the part of the House of Representatives also came in and took their seats.

Mr. Buchanan, one of the managers, rose and said that the managers, on the part of the House of Representatives, were ready to present the replication of that House, to the answer and plea of James H. Peck, judge of the district court of the United States for the district of Missouri, to the articles of impeachment exhibited against him by that body. He then read the replication, after which it was handed to the Secretary to be filed.

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[43] Senate Impeachment Journal, pp. 326, 327; Debates, p. 3.

[44] The Debates say that this proclamation was made by the marshal of the District of Columbia.

[45] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

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2376. Peck's impeachment continued.

In the Peck trial, after the witnesses had been called, the court granted the request of the managers for delay to await a material witness.

The President then informed the managers that they were at liberty to proceed in support of the article of impeachment exhibited.

On request of Mr. Buchanan the witnesses on behalf of the managers were called; and on request of Mr. Meredith the witnesses for the respondent were also called.

Then it was—

Ordered, That the Secretary inform the House of Representatives that the Senate will, on Monday next, at 12 o'clock, be ready further to proceed on the trial of the impeachment of James H. Peck, judge. * * *

The court then adjourned to Monday next at 11 o'clock.

2377. Peck's impeachment continued.

The House attended its managers a portion of the time during the Peck trial, including the days of final argument.

The subject of attendance with the managers was discussed during the Peck trial, with citation of American and English precedents.

The court of impeachment provided that the House should be notified daily of its sittings.

The court of impeachment may adjourn over without interfering with session of the Senate in the interim.

When the managers had returned to the House,[46] a question was raised over the fact that the House itself had not attended the managers. Mr. Buchanan said that no motion had been made on the subject, and the managers had felt it their duty to go and present the replication without awaiting action. As to the question of attendance generally, with the permission of the House he would state the course that had been pursued by the managers. They had examined all the precedents which had occurred in this country to guide them to a correct performance of their duty. It was ascertained that since the adoption of the present Constitution there had been three impeachments, viz, those of Messrs. Blount and Pickering and Judge Chase. On the trial of the first two the House did not attend in a body, but left it to the managers to conduct the impeachment; on the trial of Judge Chase, they did attend every day. It not being considered by the managers of the pending trial that any principle so important as to interrupt the legislative business of the House was involved in the present case, they had gone to the Senate this day, as managers, and presented to that body the replication agreed upon by the House. Mr. Buchanan further remarked that he had consulted the English precedents. On the trial of Warren Hastings the House of Commons attended at the commencement of the trial, but they did not continue to do so. On the trial of the Earl of Macclesfield they did not attend until his conviction by the House of Lords; and then they attended in consequence of a message having been sent them by that body that they were ready to pronounce judgment on the impeached, if the House of Commons would attend and demand it.

[46] Debates, p. 358.

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This question arose from time to time during the trial. On December 20,[47] when the trial was to begin, Mr. Michael Hoffman, of New York, proposed an order that the House, from time to time, resolve itself into Committee of the Whole to attend, but after discussion as to the state of the general business before the House, it was decided to modify the proposition so as to provide merely for attendance on that day. On December 22 [48] a proposed order that the House attend each day until otherwise ordered was disagreed to, yeas 83, nays 88. On December 23,[49] by a vote of yeas 96, nays 30, it was—

Resolved, That during the trial of the impeachment now pending before the Senate this House will meet daily at the hour of 11 o'clock in the forenoon; and that, from day to day, it will resolve itself into a Committee of the Whole and attend said trial during the continuance thereof, and until the conclusion of the same.

The House acted in accordance with this resolution until January 4,[50] when the vote agreeing to it was reconsidered, and then the resolution was disagreed to, yeas 69, nays 118. Thereupon Mr. Kensey Johns, jr., of Delaware, proposed this resolution:

Resolved, That a message be sent by the Clerk of the House, informing the Senate that the House of Representatives decline further attendance during the trial of the impeachment of Judge Peck.

This was criticised as likely to give an impression that the House had abandoned the impeachment. Finally, after being amended, on motion of Mr. Storrs, the resolution was agreed to in this form:

Resolved, That the managers appointed to conduct the impeachment of James H. Peck be instructed to attend the trial of the said impeachment, at such times as the Senate shall appoint for that purpose; and that the attendance of the House be dispensed with until otherwise ordered by the House, and that the Clerk communicate this resolution to the Senate.

On January 17 [51] it was resolved by the House that "during the argument of counsel in the impeachment" this House "will, from day to day, resolve itself into a Committee of the Whole on the state of the Union and attend the same."

And in accordance with this order the House attended until the end of the session.

On December 24,[52] after the House had decided to attend each day, the high court of impeachments—

Ordered, That the Secretary notify the House of Representatives, from day to day, that the Senate is sitting as a high court of impeachment for the trial of James H. Peck, judge of the district court of the United States for the district of Missouri.

And on January 3, 1831,[53] when it was ordered that the adjournment of the high court on that day (a Monday) be to Wednesday, it was also ordered that the House be informed. It may be noted that while the high court of impeachment adjourned over January 4, the Senate itself was in session on that day.

2378. Peck's impeachment continued.

The presentation of evidence and the arguments in the Peck trial.

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[47] Debates, p. 378; House Journal, p. 80.
[48] Debates, p. 379; House Journal, pp. 91, 92.
[49] Debates, p. 382; House Journal, p. 97.
[50] Debates, p. 399; House Journal, p. 140.
[51] Debates, p. 518; House Journal, p. 186.
[52] Senate Impeachment Journal, p. 329.
[53] Senate Journal, pp. 67, 330.

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On the final arguments in the Peck trial the managers had the opening and closing.

In the Peck trial a Senator was examined as a witness on behalf of respondent.

On receipt of a letter from a physician, showing the illness of one of Judge Peck's counsel, the court adjourned.

On Monday, December 20,[54] the court having been opened by proclamation, and the managers accompanied by the House of Representatives, and the respondent accompanied by his counsel having attended, at the request of Mr. Meredith the witnesses in behalf of the respondent were called. Although one or two material witnesses failed to answer, Mr. Meredith announced that they were ready to go to trial.

The President informed the managers that they might now proceed to substantiate their charge.

Mr. McDuffie thereupon proceeded to open the cause, and concluded on the succeeding day. Then, on December 21 [55] and thereafter until January 5, 1831, witnesses were called for the managers, the same being cross-examined on behalf of the respondent.

On January 5,[56] Mr. Meredith opened the defense and began the introduction of testimony, which continued to January 17.

On January 11,[57] Thomas H. Benton, a senator from Missouri, was sworn on behalf of the respondent.

On January 13,[58] the Vice-President communicated a letter from the physician attending Mr. Wirt, one of the counsel for the respondent, stating that Mr. Wirt would be unable to attend until the 17th. Thereupon the high court adjourned until that date. Once previously it had adjourned for the same reason at request of counsel and with consent of managers.

On January 17,[59] Mr. Spencer, on behalf of the managers, commenced the argument in support of the article of impeachment, and on January 18, Mr. Wickliffe, also on behalf of the managers, continued.

On January 19,[60] Mr. Meredith commenced the argument on behalf of the respondent, and continued until January 22, when Mr. Wirt continued the argument for the respondent until January 25, when he concluded.

From January 26 to 29,[61] Messrs. Storrs and Buchanan occupied the time with the arguments for the managers.

2379. Peck's impeachment continued.

In the arguments in the Peck trial the managers resisted the theory that impeachment might be only for indictable offenses.

Argument of Mr. Manager Spencer on the nature of impeachable offenses.

In the course of the argument the managers and counsel for respondent considered not only the evidence and law applicable to the article itself, but discussed the nature of the power of impeachment. Mr. Manager Spencer said: [62]

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[54] Senate Impeachment Journal, pp. 327, et seq.; Debates, p. 10.
[55] Senate Impeachment Journal, pp. 328–330.
[56] Journal, pp. 331; Annals, p. 26.
[57] Journal, p. 334; Debates, p. 28.
[58] Journal, p. 335; Debates, pp. 23, 27, 28.
[59] Journal, p. 335; Debates, p. 34.
[60] Journal, pp. 335, 336; Debates, p. 34.
[61] Journal, p. 337; Debates, p. 44.
[62] Report of the trial of James H. Peck, p. 290.

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

2380. Peck's impeachment continued.

Argument of Mr. Manager Wickliffe on the constitutional provisions relating to impeachment.

Mr. Manager Wickliffe said: [63]

I do not know that it will be contended by the counsel for the respondent, as it has been on a former impeachment before the Senate of the United States, with great ability and apparent confidence, "that a judge can not be impeached for any offense which is not indictable; that the Constitution declares the judges shall be removed from office by impeachment for treason, bribery, and other high crimes and misdemeanors;" consequently as nothing less than the commission of some offense which may be punishable by indictment, presentment, or information comes within the known interpretation of the terms "high crimes and misdemeanors," no act, judicial or otherwise, unless indictable, is impeachable.

I do not agree with this interpretation of the Constitution. * * *

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

The framers of the Constitution wisely limited the punishment which this court may award, fixing a point beyond which you can not go, but leaving you in the exercise of a sound discretion to make it less than removal from office. They were governed by equal wisdom when they left the official delinquent to answer personally to the offended laws of the State in which he had committed any crime or misdemeanor against their injunctions.

The offense for which an officer may be impeached might not, in the judgment of his triers (though deserving punishment), require the infliction of the severer punishment, that of removal from the disqualification for office. It might not deserve both of these penalties, perhaps neither; a reprimand, a temporary suspension of his functions and salary, might, in particular cases, be a punishment equal to the official misdemeanor.

If nothing else had been said in this Constitution upon the subject of impeachment, who would doubt the plenitude of power, the nature of the punishment, or the objects upon which Congress could exercise it? But, sir, the members of the convention, as if solemnly impressed with the danger to the judiciary and other departments of the Government, resulting from the humanity and mercy of the members of the tribunal for the trial of impeachment; or, perhaps, looking at the dark side of the picture of human nature, believing it possible that the time might come when a judge or other officer, though stained with the foul crime of treason and bribery, or other high crimes and misdemeanors, would find favor in the sympathies, or cover in the bad passions of his triers, who would blush, however, to pronounce him not guilty in the face of conclusive evidence, but who would, nevertheless, diminish the punishment under the discretionary power in the first article, and leave the traitor or convicted felon to disgrace the judicial ermine or official robe. To guard against this possible state of the case, * * * the members of the convention intended, by the sixth section of the second article, to declare what shall be the punishment to be awarded by the court of impeachment for the enumerated offenses of treason, bribery, and other high crimes and misdemeanors; hence they declared that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misde-

[63] Report of the trial of James H. Peck, pp. 308–310.

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meanors." This language is imperative; it leaves you no discretion, you can not stop short of removal from office; you can not exceed it.

If the construction of the Constitution which was contended for in the impeachment to which I have referred be the true reading of the instrument, and it shall be decided that no offense, no conduct of an officer, unless it be a high crime and misdemeanor, with the technical meaning of these terms, and punishable by some known and existing criminal law, is impeachable, what would be the condition of our Government, and especially the judicial department? No matter what was the conduct of a judge in or out of court, if he kept himself without the pains and penalties enacted for the punishment of treason, felony and vice, in the most degraded of civil society, no power exists to strip him of the judicial character which he degraded. He would, covered with disgrace and immorality, smile with contempt at your power, and shield himself under the imputed ignorance of the members of the convention.

A few cases will, I think, suffice to prove the fallacy of such a construction of the Constitution. Suppose a judge, who is bound to open his court at stated periods for the trial of causes, fulfills the letter of the law, opens his court at the regular stated terms, but as regularly adjourns, and refuses to hear and decide the causes pending in court. This, sir, would be no indictable offense under any law; yet I am inclined to believe this court would remove him from office for official misconduct, for misbehavior in office, a forfeiture of the condition, upon which he held his commission.

Suppose a judge, under the influence of political feeling, * * * shall award to his favorite a new trial, in an important cause, against known law, would this be an indictable offense under any code of laws in force in this Government?

Suppose a judge shall forget the dignity which belongs to the station he fills, and to disregard that decorum which should ever regulate the conduct of a judge, in and out of court, shall, while in court, take advantage of his situation, and labor for two hours in pouring forth his abuse and vituperation upon a respectable and unoffending citizen, whom he has dragged before him by the strong arm of usurped power—in what court would you file your indictment against him, for a high misdemeanor? * * *

Take the case of the President of the United States. Suppose him base enough, or foolish enough, if you please, to refuse his sanction to any and every act which Congress may pass. This is a power which, according to the Constitution, he can exercise. Will it be contended that he could be indicted for it, as a misdemeanor, in any court, State or Federal? Yet where is the man who would hesitate to remove him from office by impeachment? If one of the heads of a department shall so far forget the obligations of his official duty as to direct his power and patronage, not to the promotion of the welfare of the country, but with the known and avowed purpose of his own personal or political aggrandizement, who would think of finding an indictment in a criminal court of justice against him? Yet who would not remove him from office by impeachment?

If precedent is to have any authority in this court, I consider the question settled by the Senate of the United States in the trial of Judge Pickering, of New Hampshire. The principal charge exhibited against him was a disregard of a plain statute of the United States, which makes it the duty of a district court, before restoration of goods libeled for a violation of the revenue laws of the United States, to the claimant in court, to take from him bond and security to return the goods or to perform the judgment of the court. Upon this charge the Senate found him guilty and removed him from office. He was also charged with intemperance, which, though a misdemeanor, has never been denominated or regarded by the laws of any country a "high misdemeanor."

2381. Peck's impeachment continued.

Argument of Mr. Manager Buchanan on the nature of impeachable offenses.

Argument that the proof of intention is not necessary in an impeachment trial to secure punishment for the fact.

Mr. Manager Buchanan said: [64]

The Constitution of the United States declares the tenure of the judicial office to be "during good behavior." Official misbehavior, therefore, in a judge is a forfeiture of his office. But when we say this we have advanced only a small

[64] Report of the trial of James H. Peck, pp. 427–429.

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distance. Another question meets us. What is misbehavior in office? In answer to this question, and without pretending to furnish a definition, I freely admit that we are bound to prove that the respondent has violated the Constitution or some known law of the land. This, I think, was the principle fairly to be deduced from all the arguments on the trial of Judge Chase, and from the votes of the Senate in the articles of impeachment against him, in opposition to the principle for which his counsel in the final first instance strenuously contended, that in order to render an offense impeachable it must be indictable. But this violation of law may consist in the abuse, as well as in the usurpation of authority. The abuse of a power which has been given may be as criminal as the usurpation of a power which has not been granted. Can there be any doubt of this? Suppose a man to be indicted for an assault and battery. He is tried and found guilty, and the judge, without any circumstances of peculiar aggravation having been shown, fines a thousand dollars and commits him to prison for one year. Now, although the judge may possess the power to fine and imprison for this offense, at his discretion, would not this punishment be such an abuse of judicial discretion and afford such evidence of the tyrannical and arbitrary exercise of power as would justify the House of Representatives in voting an impeachment? But why need I fancy cases? Can fancy imagine a stronger case than is now, in point of fact, before us? A member of the bar is brought before a court of the United States guilty, if you please, of having published a libel on the judge—a libel, however, perfectly decorous in its terms and imputing no criminal intention, and so difficulty of construction that though the counsel for the respondent have labored for hours to prove it to be a libel, still that question remains doubtful. If, in this case, the judge has degraded the author by imprisonment and deprived him of the means of earning bread for himself and his family by suspending him from the practice of his profession for eighteen months, would not this be a cruel and oppressive use of authority, even admitting the power to punish in such a case to be possessed by the judge?

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

It has been contended that even supposing the judge to have transcended his power and violated the law, yet he can not be convicted unless the Senate should believe he did the act with criminal intention. It has been said that crime consists in two things—a fact and an intention; and in support of this proposition the legal maxim has been quoted that "actus non fit reum, nisi, mens rea." This may be true as a general proposition, and yet it may have but a slight bearing upon the present case. Did the gentlemen mean to contend that before the judge could be convicted we must prove by positive testimony malice in his breast, a lurging enmity against Mr. Lawless and the purpose of gratifying a base revenge? I should suppose that to have been the reason for which they asked so many questions to show that the judge and Mr. Lawless had previously been upon good terms. This argument may be answered with great force in the strong language of the respondent himself in his answer to the article of impeachment. "Both in law and morals (says the judge) every man is presumed to intend the natural consequences of his own actions." This was the rule by which he tried Mr. Lawless. He took up the article signed "A Citizen" and from that article alone he inferred the intention of its author. In doing this he acted correctly; but his jaundiced mind and wounded vanity had so diseased his perceptions that he saw burnt letters upon the scroll, although in themselves they were perfectly innocent and harmless. * * *

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

And yet am I to be told that if a judge shall do an act which is in itself criminal, if he shall, in an arbitrary and oppressive manner, and without the authority of law, imprison a citizen of this country, and thus consign him to

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infamy, you are not to infer his intention from the act? Is not the act itself the best source from which to draw the inference? * * *

The fourth article of impeachment exhibited against Judge Pickering charged him with having appeared upon the bench in a state of total intoxication. This was gross official misbehavior. Would the Senate in that case have gravely listened to an argument to prove that the judge might have got drunk without an evil intention? Certainly not. The act was done. The tribunal had been disgraced, and the Senate inferred his intention from his conduct and turned him out of office.

2382. Peck's impeachment continued.

Mr. William Wirt argued in defense of Judge Peck that a judge might not be impeached for a mere mistake of the law without guilty intent.

Mr. William Wirt's argument that intent was not established by proof of the mere commission of an unlawful act.

Arguing for the respondent, Mr. Wirt said: [65]

Even if the judge were proved to have mistaken the law, that would not warrant a conviction, unless the guilt of intention be also established. For a mere mistake of the law is no crime or misdemeanor in a judge. It is the intention that is the essence of every crime. The maxim is (for the principal is so universally admitted that it has grown into a maxim) actus non facit reum nisi mens sit rea.

Sir, if the impeachment had not contained the charge of the guilty intention the respondent, under the advice of his counsel, would have demurred to it; not by any special demurrer to the form, but a general demurrer to the substance, for the intention is the substance of the crime. The honorable managers who prepared this article of impeachment were perfectly aware of this and have, therefore, very properly charged the intention in express terms. Sir, it is a material part of the charge, and what it was material to charge it is material to prove. * * * One of the honorable managers, seeming to perceive the impossibility of satisfying any candid mind that the respondent was guilty of the intention charged, endeavored to escape this rule of the criminal law by contending that if they fixed on the respondent the commission of an unlwaful act, the guilty intention charged in the impeachment followed as a necessary implication of law. This I deny; for then every mistake of law on the part of a judge would become a crime or a civil injury, for which he would be personally responsible. The honorable manager sought to illustrate his proposition by the cases of murder and forgery. "If," said he, "a party be proved to have committed a deliberate murder, will he not be presumed to have intended to commit murder? Is separate proof of intention ever required in such case? Or if a man be proved to have commited forgery, will not the law infer the intention from the act?" This is plausible; let us examine its solidity: It is the proposition which they must maintain, and from which alone they can have any hope of success in this case. Is it sound?

Mr. Wirt then proceeded to discuss the crimes of murder and forgery to show that guilty intention was part of the proof in such cases, since neither crime existed without guilty intention. Continuing, he said:

Another of the honorable managers (Mr. Wickliffe) has advanced a proposition so novel and so directly confronted by all the authorities, that had it not been for some other things that I have heard in this case, I should have heard it with unmixed surpise. The honorable manager tells us that "he cares not for proof of intention; that he cares not whether the judge acted wrong from ignorance or intention. That ignorance of the law is no excuse in an unlearned layman, much less in a learned judge. That every man is presumed to know the law, and a fortiori, a judge whose office it is to understand and administer the law. If, therefore, a judge through ignorance of the law has done that which he has no power to do, he is just as guilty in the eye of the law as if he had sinned intentionally against the light of knowledge."

Then, according to this process of reasoning, a mistake of the law by a judge is an impeachable offense. But is it possible that the honorable manager can mean to contend that a judge is answerable, either civilly or criminally, for an error of

[65] Report of the trial of Judge Peck, pp. 485, 486, 492, 494–497.

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judgment; that he can be either sued, indicted, or impeached for such an error? If such be his meaning, he is in direct conflict with all the authorities on the subject. The question is not a new one. It has been long since settled both in England and the United States; and I am not aware that, for many centuries, any judge or advocate has, even by inadvertence, sanctioned or even countenanced the position which has been thrown out by the gentleman. From the reign of Edward II to the present day the current of authorities is clear and uniform the other way, and established beyond controversy the principle that the judge of a court of record is not answerable either civilly or criminally for a mistake of judgment in his judicial character.

Mr. Wirt then discusses the case of Yates and Lansing, wherein the English authorities were reviewed by Chief Justice Kent, and says:

What does the judge declare would be an impeachable offense? The acting with knowledge (scienter) that the judge was violating the law "the intentional violation of the law." The chancellor, he says, was bound to imprison the party if he considered his conduct as a contempt of court. He might have been mistaken in considering that as a contempt, which in truth was not one. But this would have been a mere error of judgment, for which he was not answerable either civilly much less criminally. If he knew it was not a contempt, and still punished it as one, it would have been an intentional violation of the law, which would have been an impeachable offense. Here is the very doctrine for which we are contending—that it is the guilty intention which forms the gist of the charge in every impeachment, and that a mere mistake of judgment is not an impeachable offense. * * *

I have examined, with all the attention and care in my power, the various cases of impeachment of judges, both in England and the United States, and I have not observed that any counsel, even under the severest stress of the evidence, has taken refuge in so bold a proposition as this which we are considering—that error of judgment is an impeachable offense. On the contrary, I think it will be found, on the strictest perusal of all the cases that have been cited, that the counsel on both sides have uniformly proceeded on the concession that the guilty intention is the gist of the impeachment.

The discussion of the power of impeachment was preliminary merely, the main force of the arguments going to the question of law as to the right of the judge to punish for contempt, and the question of fact as to his intention.

2383. Peck's impeachment continued.

The Senate proceeded to judgment in the Peck case without prior deliberation in secret session.

The House accompanied its managers when the court pronounced judgment in the Peck impeachment.

Form of question put in ascertaining the judgment of the court in the Peck trial.

A Senator who had been a witness for respondent was excused from voting on the judgment in the Peck trial.

A Senator who had taken his seat after part of the testimony in the Peck trial had been taken was excused from voting.

Two-thirds not voting guilty, the Vice-President declared Judge Peck acquitted.

Judgment being rendered in the Peck impeachment, the Vice-President directed an adjournment sine die.

On Saturday, January 29,[66] at the conclusion of the arguments, on motion of Mr. Daniel Webster, of Massachusetts:

Resolved, That the Senate will, on Monday next, at 12 o'clock, proceed further on the trial of the article of impeachment exhibited by the House of Representa-

[66] Senate Impeachment Journal, p. 337.

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tives of the United States against James H. Peck, judge of the district court of the United States for the district of Missouri.

On Monday, January 31,[67] the court was opened as usual, with proclamation. The managers, accompanied by the House of Representatives, attended. James H. Peck, the respondent, and his counsel also attended.

Mr. Littleton W. Tazewell, of Virginia, moved the following resolution:

Resolved, That this court will now pronounce judgment upon James H. Peck, judge of the district court of the United States for the district of Missouri.

Mr. Tazewell observed that if there were one member of the court unprepared for a decision on this impeachment at this time, or preferred any other mode of proceeding to pronounce judgment, he would cheerfully withdraw the resolution.

No objection having been made, the resolution was unanimously adopted.

The names of the Senators were then called over by the Secretary.

The Secretary of the Senate, under the direction of the Vice-President, read the article of impeachment exhibited by the House of Representatives against James H. Peck, judge of the district court of the United States for the district of Missouri.

The Vice-President rose and said:

Senators: You have heard the article of impeachment read; you have heard the evidence and the arguments for and against the respondent; when your names are called you will rise from your seats and distinctly pronounce whether he is guilty or not guilty, as charged by the House of Representatives.

The Vice-President then, in an audible voice, put the following question to each of the Senators in alphabetical order:

Mr. Senator ———: What say you: Is James H. Peck, judge of the district court of the United States for the district of Missouri, guilty or not guilty of the high misdemeanor charged in the article of impeachment exhibited against him by the House of Representatives?

Each Senator rose from his seat as this question was propounded to him, and answered.

Messrs. Thomas H. Benton, of Missouri, who had been a witness, and John M. Robinson, of Illinois, who had taken his seat on January 4, after the testimony for the managers had been concluded, were, on their request, excused from voting.

The vote having been ascertained, the Vice-President said:

Senators: Twenty-one Senators having voted that the respondent is guilty and 22 that he is not guilty, and two-thirds of the Senate not having voted for his conviction, it becomes the duty of the Chair to pronounce that James H. Peck, the judge of the district court of the United States for the district of Missouri, stands acquitted of the charge exhibited against him by the House of Representatives.

The Vice-President then directed the marshal to adjourn the court of impeachment; and it was accordingly adjourned sine die.

2384. Peck's impeachment continued.

A report of the acquittal of Judge Peck was made in the House in the report of the chairman of the Committee of the Whole.

Forms of reports made by a chairman of a Committee of the Whole after attending an impeachment trial. (Footnote.)

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[67] Journal, pp. 337, 338; Debates, p. 45.

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The House attended the Peck trial as a Committee of the Whole House. (Footnote.)

The journal of the House for this day has this entry: [68]

The House again resolved itself into a Committee of the Whole House, and proceeded to the Senate Chamber to attend the trial by the Senate of the impeachment of James H. Peck, judge of the district court of the United States for the district of Missouri; and, after some time spent therein, the committee returned into the Chamber of the House; and, the Speaker having resumed the chair, Mr. Cambreleng [Churchill, C., of New York], from the Committee of the Whole, reported that the committee had, according to order, attended the trial of the said impeachment, and that the said James H. Peck had been acquitted by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in their article of impeachment exhibited against him.[69]

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[68] House Journal, p. 236.

[69] The reports from day to day had been similar, but varied to meet the conditions. Usually they ended somewhat like this: "That further progress had been made therein, and that the court of impeachment had adjourned to meet again tomorrow, at 12 o'clock meridian." If no progress had been made, the report simply gave the hour to which the court had adjourned. (Journal, pp. 226, 229.) Mr. William D. Martin, of South Carolina, acted as chairman of the Committee of the Whole a portion of the time.

It is to be noticed that, while the impeachment had been considered in Committee of the Whole House on the state of the Union, the House resolved itself into the Committee of the Whole House to attend the proceedings.

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The Impeachment and Trial of West H. Humphreys*

1. Preliminary investgiation by the House. Section 2385.
2. Presentation of the impeachment at the bar of the Senate. Section 2386.
3. Choice of managers and drawing and presentation of articles. Sections 2387–2390.
4. Writ of summons and calling respondent to answer. Sections 2391, 2392.
5. Proclamation issued on respondent's failure to appear. Section 2393.
6. Trial proceeds in absence of respondent. Section 2394.
7. Managers, without argument, demand judgment. Section 2395.
8. Questions arising in judgment. Sections 2396, 2397.

2385. The impeachment and trial of West H. Humphreys, United States judge for the several districts of Tennessee.

It being declared by common fame that Judge Humphreys had joined the foes of the Government the House voted to investigate his conduct.

After an ex parte investigation the House voted to impeach Judge Humphreys.

Form of resolution providing for carrying the impeachment of Judge Humphreys to the Senate.

The impeachment of Judge Humphreys was carried to the Senate by a committee of two representing the two political parties.

On January 8, 1862,[1] Mr. Horace Maynard, of Tennessee, presented the following preamble and resolution, which were agreed to by the House without debate or division:

Whereas it is alleged that West H. Humphreys, now holding a commission as one of the judges of the district court of the United States, has, for nearly twelve months, failed to hold the courts for the districts of East, Middle, and West Tennessee, as by law he was required to do, and that he has accepted a judicial commission in hostility to the Government of the United States, and is assuming to act under it,

Resolved, That the Committee on the Judiciary inquire into the truth of the said allegations, with power to send for persons and papers, and report from time to time such action as they may deem proper.

On March 4, 1862,[2] Mr. John A. Bingham, of Ohio, submitted the report of the committee. This report showed that the committee examined four witnesses, Mr. Maynard, Member of the House, and Messrs. Trigg, McFall, and Lellyet, citizens of Tennessee. It does not appear that anyone was present to represent Judge Humphreys at the investigation, or that any suggestion was made in his behalf. From the testimony it appeared that Judge Humphreys, who still held and had

*Hind's Precedents, vol. 3, p. 805 (1907).
[1] Second session Thirty-seventh Congress, Journal, p. 150; Globe, p. 229.
[2] Journal, p. 400; Globe, p. 1062; House Report No. 44.

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not resigned his commission, had publicly declared in favor of secession; that he had neglected his duties as judge; that he had officiated as judge for the confederacy, and in that capacity had entertained proceedings against loyal citizens. Therefore the committee proposed this resolution:

Resolved, That West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, be impeached of high crimes and misdemeanors.

On May 6,[3] after the reading of the report and very brief debate, the House agreed to the resolution without division.

Thereupon, Mr. Bingham, stating that he followed the usual precedents, offered the following resolution, which was agreed to without division:

Resolved, That a committee of two be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives and of all of the people of the United States, to impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate order for the appearance of said West H. Humphreys to answer said impeachment.

The Speaker[4] thereupon appointed Mr. Bingham and Mr. George H. Pendleton, of Ohio, as the committee; both were members of the Judiciary Committee, and Mr. Bingham represented the majority party in the House and Mr. Pendleton the minority party.

2386. Humphreys's impeachment continued.

Forms and ceremonies of presenting the impeachment of Judge Humphreys in the Senate.

Form of resolution adopted by the Senate in taking order for the impeachment of Judge Humphreys.

On May 7,[5] in the Senate, a message was received from the House by its Clerk, announcing the passage of the resolution and the committee appointed in accordance therewith.

Immediately thereafter the committee, Messrs. Bingham and Pendleton, appeared at the bar of the Senate, and Mr. Bingham spoke as follows:

Mr. President, by order of the House of Representatives, we appear at the bar of the Senate, and in the name of the House of Representatives and of all the people of the United States, we do impeach West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and we do further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and in their name we do demand that the Senate take order for the appearance of said West H. Humphreys to answer to said impeachment.

The Presiding Officer[6] said:

The Senate will take order in the premises.

It does not appear that the committee from the House reported to that body on their return from the Senate.

In the Senate, on May 8,[7] the message from the House was read, and

[3] Journal, p. 646; Globe, pp. 1966, 1967.
[4] Galusha A. Grow, of Pennsylvania, Speaker.
[5] Senate Journal, p. 454; Globe, p. 1991.
[6] Lafayette S. Foster, of Connecticut, in the chair.
[7] Senate Journal, pp. 456, 457; Globe, p. 2010.

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on motion of Mr. Lafayette S. Foster, of Connecticut, the subject was referred to a select committee of three, to be appointed by the Chair. Thereupon the President pro tempore[8] appointed Messrs. Foster, James R. Doolittle, of Wisconsin, and Garrett Davis, of Kentucky.

On May 9,[9] in the Senate, Mr. Foster reported from the select committee the following resolution, which was agreed to without division or debate:

Whereas the House of Representatives, on the 7th day of the present month, by two of their Members, Messrs. Bingham and Pendleton, at the bar of the Senate impeached West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same, and likewise demanded that the Senate take order for the appearance of the said West H. Humphreys to answer the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

On the same day a message announcing the action of the Senate was received in the House.[10]

2387. Humphreys's impeachment continued.

The committee to draw the articles in the Humphreys impeachment were appointed by the Speaker, and all but one was of the majority party.

The articles of impeachment against Judge Humphreys were agreed to by the House without debate.

On May 14,[11] in the House, Mr. Bingham submitted the following resolution, which was agreed to without debate or division:

Resolved, That a committee of five be appointed to prepare and report articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, with power to send for persons, papers, and records.

The Speaker thereupon appointed Messrs. Bingham, John Hickman, of Pennsylvania, George H. Pendleton, of Ohio, Charles R. Train, of Massachusetts, and Charles W. Walton, of Maine. All of this committee but Mr. Pendleton, of Ohio, appear to have been of the majority party in the House. All but Messrs. Train and Walton were members of the Judiciary Committee.

On May 19[12] Mr. Bingham, from the select committee, reported articles of impeachment, which were read and at once, without debate or division, were adopted by the House and ordered printed. They appear in full in the Journal of the House of this date.

2388. Humphreys's impeachment continued.

Form of resolutions providing for selection of managers and the presentation of the articles to the Senate in the Humphreys impeachment.

The managers of the Humphreys impeachment were appointed by the Speaker, and all but one belonged to the majority party.

The message informing the Senate that articles impeaching

[8] Solomon Foot, of Vermont, President pro tempore.
[9] Senate Journal, pp. 464, 465; Globe, p. 2039.
[10] House Journal, p. 665.
[11] House Journal, p. 684; Globe, p. 2134.
[12] House Journal, pp. 709–712; Globe, pp. 2205, 2206.

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Judge Humphreys would be brought contained the names of the managers.

Mr. Bingham then offered the following resolutions, which were agreed to without debate or division:

Resolved, That five managers be appointed by the Speaker of this House to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

Resolved, That the articles agreed to by this House, to be exhibited, in the name of themselves and of all the people of the United States, against West H. Humphreys in maintenance of their impeachment against him for high crimes and misdemeanors, be carried to the Senate by the managers appointed to conduct the impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers on their part to conduct the impeachment against West H. Humphreys, and have directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

On May 20 [13] the Speaker announced the appointment of the following managers: Messrs. Bingham, Hickman, Pendleton, Train, and George W. Dunlap, of Kentucky. All but Mr. Pendleton belonged to the majority part in the House.

On May 21 [14] the Clerk of the House delivered the message in the Senate as follows:

Mr. President: I am directed to inform the Senate that the House of Representatives has appointed Mr. Bingham, of Ohio, Mr. Hickman, of Pennsylvania, Mr. Pendleton, of Ohio, Mr. Train, of Massachusetts, and Mr. Dunlap, of Kentucky, managers to conduct the impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said West H. Humphreys.

2389. Humphreys's impeachment, continued.

The Senate followed the precedents in adopting rules prescribing forms and ceremonies for receiving the articles in the Humphreys impeachment.

Forms of oath taken and proclamations made in the court opened to receive the articles impeaching Judge Humphreys.

Resolved, That at 1 o'clock to-morrow afternoon the Senate will resolve itself into a court of impeachment, at which time the following oath and affirmation shall be administered by the Secretary to the President of the Senate, and by him to each Member of the Senate, to wit: "I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice, according to law;" which court of impeachment, being thus formed, will, at the time aforesaid, receive the managers appointed by the House of Representatives to exhibit articles of impeachment in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, pursuant to notice given to the Senate this day by the House of Representatives that they had appointed managers for the purpose aforesaid.

Ordered, That the Secretary lay this resolution before the House of Representatives.

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[13] House Journal, pp. 717, 718; Globe, p. 2262.
[14] Senate Journal, pp. 515–517; Globe, pp. 2247, 2248.

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The resolution having been agreed to, Mr. Foster offered the following, which was also agreed to:

Resolved, That after the managers of the impeachment shall be introduced to the bar of the Senate, and shall have signified that they are ready to exhibit articles of impeachment against West H. Humphreys, the President of the Senate shall direct the Sergeant-at-Arms to make proclamation, who shall, after making proclamation, repeat the following words: "All persons are commanded to keep silence, on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee;" after which the articles shall be exhibited, and then the President of the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

On the same day the first of the above resolutions was communicated to the House by message.[15]

On May 22,[16] in the Senate, the Vice-President [17] announced:

The hour of 1 o'clock having arrived, the Senate will now resolve itself into a court of impeachment, in pursuance of its order of yesterday, for the trial of West H. Humphreys, judge of the district court of the United States for the State of Tennessee.

The following oath was administered to the Vice-President by the Secretary of the Senate:

I, Hannibal Hamlin, do solemnly swear that in all things appertaining to the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, I will do impartial justice according to law. So help me God.

The Vice-President said:

The Secretary will now call the roll of Senators alphabetically, calling them in numbers of four and Senators will please to advance as they are called.

The Secretary called the names of Senators, and they advanced by fours to the desk, when the Vice-President administered the oath to them.

2390. Humphreys' impeachment, continued.

The House being notified that the Senate was ready to receive the articles impeaching Judge Humphreys, the managers attended unaccompanied.

The articles impeaching Judge Humphreys and their presentation.

The articles impeaching Judge Humphreys were signed by the Speaker and attested by the Clerk.

The oath having been administered to the Senators, it was then—

Ordered, That the Secretary inform the House of Representatives that the Senate has resolved itself into a high court of impeachment, and is now ready to receive the managers appointed by the House to exhibit articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

This message was duly delivered in the House, and presently four of the managers appointed by the House of Representatives, namely, Mr. Bingham, Mr. Pendleton, Mr. Train, and Mr. Dunlap (Mr. Hickman not being present), appeared below the bar.

[15] House Journal, p. 723; Globe, p. 2271.
[16] Senate Impeachment Journal, pp. 889–892; Globe, pp. 2277, 2278.
[17] Hannibal Hamlin, of Maine, Vice-President and President of the Senate.

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Mr. Bingham advanced and said:

Mr. President, myself and associates are managers appointed by the House of Representatives, and instructed in their name to appear at the bar of the Senate, and present articles of impeachment against West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, for high crimes and misdemeanors.

The VICE-PRESIDENT. The managers on the part of the House of Representatives will please be seated, at seats prepared for them within the bar of the Senate.

The managers were conducted to the seats prepared for them in the area between the Secretary's desk and the seats of the Senators.

The VICE-PRESIDENT. The Sergeant-at-Arms of the Senate will now make the usual proclamation.

The Sergeant-at-Arms, GEORGE T. BROWN, Esq. Oyez! oyez! oyez! All persons are commanded to keep silence on pain of imprisonment, while the grand inquest of the nation is exhibiting to the Senate of the United States articles of impeachment against West H. Humphreys, judge of the district court of the United States for the districts of Tennessee.

Mr. Bingham (all the managers standing) read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States in the name of themselves and of all the people of the United States against West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee, in maintenance and support of their impeachment against him for high crimes and misdemeanors.

ARTICLE 1. That, regardless of his duties as a citizen of the United States, and unmindful of the duties of his said office, and in violation of the sacred obligation of his official oath "to administer justice without respect to persons," "and faithfully and impartially discharge all the duties incumbent upon him as judge of the district court of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States for the several districts of the State of Tennessee agreeable to the Constitution and laws of the United States," the said West H. Humphreys, on the 29th day of December, A.D. 1860, in the city of Nashville, in said State, the said West H. Humphreys then being a citizen of the United States, and owing allegiance thereto, and then and there being judge of the district court of the United States for the several districts of said State, at a public meeting, on the day and year last aforesaid, held in said city of Nashville, and in the hearing of divers persons then there present, did endeavor by public speech to incite revolt and rebellion within said State against the Constitution and Government of the United States, and did then and there publicly declare that it was the right of the people of said State, by an ordinance of secession, to absolve themselves from all allegiance to the Government of the United States, the Constitution and laws thereof.

ART. 2. That, in further disregard of his duties as a citizen of the United States, and unmindful of the solemn obligations of his office as judge of the district court of the United States for the several districts of the State of Tennessee, and that he held his said office, by the Constitution of the United States, during good behavior only, with intent to abuse the high trust reposed in him as such judge, and to subvert the lawful authority and Government of the United States within said State, the said West H. Humphreys, then being judge of the district court of the United States, as aforesaid, to wit, in the year of our Lord 1861, in said State of Tennessee, did, together with other evil-minded persons within said State, openly and unlawfully support, advocate, and agree to an act commonly called an ordinance of secession, declaring the State of Tennessee independent of the Government of the United States, and no longer within the jurisdiction thereof.

ART. 3. That in the years of our Lord 1861 and 1862, within the United States, and in said State of Tennessee, the said West H. Humphreys, then owing allegiance to the United States of America, and then being district judge of the United States, as aforesaid, did then and there, to wit: within said State, unlawfully, and in conjunction with other persons, organize armed rebellion against the United States and levy war against them.

ART. 4. That on the 1st day of August, A.D. 1861, and on divers other days since that time, within said State of Tennessee, the said West H. Humphreys,

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then being judge of the district court of the United States, as aforesaid; and J. C. Ramsay, and Jefferson Davis, and others, did unlawfully conspire together "to oppose by force the authority of the Government of the United States," contrary to his duty as such judge and to the laws of the United States.

ART. 5. That said West H. Humphreys, with intent to prevent the due administration of the laws of the United States within said State of Tennessee, and to aid and abet the overthrow of "the authority of the Government of the United States" within said State, has, in gross disregard of his duty as judge of the district court of the United States, as aforesaid, and in violation of the laws of the United States, neglected and refused to hold the district court of the United States, as by law he was required to do, within the several districts of the State of Tennessee, ever since the 1st day of July, A.D. 1861.

ART. 6. That the said West H. Humphreys, in the year of our Lord 1861, within the State of Tennessee, and with intent to subvert the authority of the Government of the United States, to hinder and delay the due execution of the laws of the United States, and to oppress and injure citizens of the United States, did unlawfully act as judge of an illegally constituted tribunal within said State, called the district court of the Confederate States of America, and as judge of said tribunal last named said West H. Humphreys, with the intent aforesaid, then and there assumed and exercised powers unlawful and unjust, to wit, in causing one Perez Dickinson, a citizen of said State, to be unlawfully arrested and brought before him, as judge of said alleged court of said Confederate States of America, and required him to swear allegiance to the pretended government of said Confederate States of America; and upon the refusal of said Dickinson so to do, the said Humphreys, as judge of said illegal tribunal, did unlawfully, and with the intent to oppress said Dickinson, require and receive of him a bond, conditioned that while he should remain within said State he would keep the peace, and as such judge of said illegal tribunal, and without authority of law, said Humphreys there and then decreed that said Dickinson should leave said State.

2. In decreeing within said State, and as judge of said illegal tribunal, the confiscation to the use of said Confederate States of America of property of citizens of the United States, and especially of property of one Andrew Johnson and one John Catron.

3. In causing, as judge of said illegal tribunal, to be unlawfully arrested and imprisoned within said State citizens of the United States because of their fidelity to their obligations as citizens of the United States, and because of their rejection of, and their resistance to, the unjust and assumed authority of said Confederate States of America.

ART. 7. That said West H. Humphreys, judge of the district court of the United States as aforesaid, assuming to act as judge of said tribunal known as the district court of the Confederate States of America, did, in the year of our Lord 1861, without lawful authority, and with intent to injure one William G. Brownlow, a citizen of the United States, cause said Brownlow to be unlawfully arrested and imprisoned within said State in violation of the rights of said Brownlow as a citizen of the United States, and of the duties of said Humphreys as a district judge of the United States.

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

GALUSHA A. GROW,
Speaker House of Representatives.

Attest:
EMERSON ETHERIDGE,
Clerk House of Representatives.

Mr. Bingham delivered the articles to the Secretary, who handed them to the Vice-President.

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The VICE-PRESIDENT. The Chair informs the managers on the part of the House of Representatives that the Senate will take proper order upon the impeachment preferred, of which notice will be furnished to the House of Representatives.

The managers thereupon retired.

2391. Humphreys' impeachment, continued.

Form of resolution directing the issue of a writ of summons to Judge Humphreys, and fixing the return day.

The House was informed by message of the issuance of a writ of summons to Judge Humphreys.

Mr. Foster then offered in the high court of impeachment the following, which was agreed to:

Resolved, That the Secretary be directed to issue a summons, in the usual form, to West H. Humphreys, judge of the district court of the United States for the districts of Tennessee, to answer a certain article of impeachment exhibited against him by the House of Representatives on this day, and that the said summons be returnable here on Monday, the 9th day of June next, and be served by the Sergeant-at-Arms, or some person deputed by him, at least ten days before the return day thereof.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Then the court, on motion of Mr. Foster, adjourned until Monday, June 9, at 1 o'clock p. m.

In the House it does not appear that the managers reported after they had presented the articles of impeachment in the Senate.

On May 23 [18] in the House a message from the Senate informed the House that the issuance of a summons had been directed.

2392. Humphreys' impeachment, continued.

On the day set for the appearance of Judge Humphreys the House in Committee of the Whole House attended its managers.

Forms observed by the House attending the Humphreys trial as a Committee of the whole (footnote).

Forms of oath, proclamation, and ceremonies at the calling of Judge Humphreys to appear and answer articles of impeachment.

On June 9,[19] in the high court of impeachment, the Vice-President having administered the prescribed oath to certain Senators, and the court having been opened by proclamation, it was—

Ordered, That the Secretary inform the House of Representatives that the Senate is now sitting as a high court of impeachment for the trial of West H. Humphreys, and that seats are provided for the accommodation of the Members of the House in the Senate Chamber.

The message having been delivered, it was then resolved by the House as follows: [20]

Resolved, That the House will this day, and at such hour as the Senate shall appoint, resolve itself into a Committee of the Whole House, and attend in the Senate on the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

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[18] House Journal, p. 731.
[19] Senate Impeachment Journal, pp. 893, 894; Globe, pp. 2617, 2618.
[20] House Journal, p. 821; Globe, p. 2621.

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Accordingly the House resolved itself into a Committee of the Whole House, Mr. E. B. Washburne, of Illinois, being chairman, and proceeded to the Senate Chamber.[21]

Previous to the arrival of the House the Senators took seats on a platform prepared on the right and left of the Vice-President, leaving the body of the Hall for the House of Representatives.

The managers and Representatives having arrived, the following occurred:

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation opening the court.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting as a court of impeachment on the case of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

The Sergeant-at-Arms handed his return to the Vice-President.

The VICE-PRESIDENT. The return of the officer will be read by the Secretary.

The Secretary read, as follows:

UNITED STATES OF AMERICA, *City of Washington, ss:*

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, in obedience to the within and foregoing writ of summons and precept to me directed, did proceed to the usual place of residence of the within-named West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, on the 29th day of May, A.D. 1862, and then and there made diligent inquiry for the said West H. Humphreys, but he could not be found. I further certify, that on the same day and year, and at the usual place of residence of the said West H. Humphreys, in the vicinity of Nashville, in the State of Tennessee, I did then and there leave true and attested copies of the within and foregoing writ of summons and precept.

GEORGE T. BROWN,
Sergeant-at-Arms of the Senate.

JUNE 9, 1862.

The VICE-PRESIDENT. The Secretary will administer the oath to the Sergeant-at-Arms touching the truth of his return.

The Secretary administered the oath to the Sergeant-at-Arms, as follows:

"George T. Brown, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made and subscribed by me upon the process issued on the 22d day of May last, by the Senate of the United States against several H. Humpherys, judge of the district court of the United States for the several districts of Tennessee, is truly made, and that I have performed said services as therein described. So help me God.

The VICE-PRESIDENT. The Sergeant-at-Arms will make proclamation for the appearance of West H. Humphreys.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

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[21] The Globe (p. 2617) has the following as to the order: "The form in which it appears on such occasions displaces its high functionary, the Speaker, its Sergeant-at-Arms, and the emblem of its authority—the mace.

"The chairman, supported by Emerson Etheridge, esq., the Clerk, and Ira Goodnow, esq., the Doorkeeper, were conducted to seats in the center aisle, in front of the Vice-President; the managers on the part of the House of Representatives, Messrs. Bingham, Pendleton, Dunlap, and Train, took the seats which they previously occupied in the right section of the central area; that on the left, with similar accommodations, was provided for the judge impeached and his counsel, if they should appear. The Members of the House occupied the body of the Senate Chamber."

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2393. Humphreys' impeachment continued.

Judge Humphreys did not appear, in person or by attorney, to answer the articles of impeachment.

Judge Humphreys not appearing, the case was continued on motion of the managers, to enable the production of testimony.

Judge Humphreys having failed to appear to answer the articles of impeachment, the court directed publication of a proclamation for him to appear.

In the Humphreys impeachment it was first provided that the subpoenas should be served by the Sergeant-at-Arms or his deputy.

Form of report of Chairman of the Committee of the Whole on returning from the Humphreys trial.

Whereupon, West H. Humphreys not appearing in person, or by counsel, to answer the said articles of impeachment, the following occurred:

Mr. Manager BINGHAM (after a pause). On behalf of the managers of the House of Representatives, I move the continuance of this cause until the 26th day of June, 1862, in order to obtain the attendance of witnesses necessary to the prosecution of the impeachment.

The VICE-PRESIDENT. Senators, the following motion is submitted for the decision of the court: On behalf of the managers of the House of Representatives, Mr. Bingham moves that further proceedings in the impeachment of West H. Humphreys, be postponed until Thursday, the 26th day of June, 1862.

The roll being called, there appeared, yeas 35, nays 4. So the motion was agreed to.

The Vice-President then informed the managers that of such other proceedings as should be taken by the Senate in the case of the impeachment of West H. Humphreys, the House of Representatives should be duly notified.

Thereupon the managers, attended by the House of Representatives, withdrew and having returned into their own Hall, the Committee of the Whole House rose,[22] and the Speaker having resumed the Chair, Mr. Washburne reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment, when the Senate postponed the further consideration of the case until Thursday, the 26th instant.

Meanwhile, in the high court of impeachment, on motion of Mr. Foster, and by a vote of yeas 36, nays 0, the following was agreed to:[23]

Ordered, That this high court of impeachment stand adjourned till the 26th day of June next, at 12 o'clock, meridian; and as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star, newspapers printed in the city of Washington, for at least ten days successively, before said 26th day of June, instant, and also in the Nashville Union, a newspaper published in the city of Nashville, State of Tennessee, on at least five several days before said 26th day of June, instant.

And further, on motion of Mr. Foster, and in order to obviate the difficulty which might arise from there being no marshal of the United States in certain districts where it might be necessary to send subpoenas, it was further

[22] House Journal, p. 821; Globe, p. 2621.
[23] Senate impeachment Journal, p. 894; Globe, pp. 2617, 2618.

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Ordered, That subpoenas may be issued by the Secretary of the Senate, according to the rules [24] of proceedings of the Senate, when acting as a court of impeachment, and directed to the Sergeant-at-Arms of the Senate, or his deputy, as well as to the marshal of the district of ———.

The court then adjourned to Thursday, June 26, at 12 o'clock, meridian.

On June 10 [25] a message was received in the House giving information of the resolutions adopted by the court after the House had retired, and of the date to which the court had adjourned.

2394. Humphreys's impeachment, continued.

Judge Humphreys's having failed to appear in answer both to the summons and proclamation, the Presiding Officer announced that the managers might proceed in support of the articles.

Form of proclamation for appearance of Judge Humphreys, and the proof thereof on the day set for appearance.

In the absence of the Vice-President the President pro tempore took the oath and presided at the Humphreys trial.

At the beginning of the Humphreys trial the returns on the subpoenas were read and the names of the witnesses called.

A witness unable to attend the Humphreys trial was excused by the court.

On June 26,[26] when the high court of impeachment again opened, the Vice-President was absent and the President pro tempore [27] of the Senate was in the chair. At once the Secretary administered to him the prescribed oath. The court was then opened by proclamation as follows by the Sergeant-at-Arms:

Oyez! Oyez! Oyez! Silence is commanded on pain of imprisonment while the Senate of the United States is sitting as a high court of impeachment for the trial of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee.

On motion of Mr. Foster—

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed on the trial of the impeachment of West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, and that seats are provided for the accommodation of the Members.

This message being received in the House [28] that body resolved itself into a Committee of the Whole House and proceeded to the Senate. When they arrived the Sergeant-at-Arms of the Senate appeared before the bar and announced: [29]

The honorable the House of Representatives of the United States.

The Members then entered and took the seats assigned them, the chairman of the Committee of the Whole House occupying a seat in the aisle in front of the President pro tempore, and the Clerk of the House having a seat near him. The managers on the part of the House were conducted to seats assigned to them in the area in front of the Secretary's desk.

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[24] The rules governing impeachments, adopted at the trial of Judge Chase and followed without readoption in the trial of Judge Peck and in this trial, provided that subpoenas should in every case be directed to the marshal of the districts wherein the witness might reside.

[25] House Journal, p. 832.

[26] Senate Impeachment Journal, p. 895; Globe, p. 2942.

[27] Solomon Foot, of Vermont, President pro tempore.

[28] House Journal, p. 940.

[29] Senate Impeachment Journal, p. 895; Globe, p. 2942.

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By direction of the President pro tempore, the Secretary read the return made by the Sergeant-at-Arms on the 9th instant and already read in the high court on that day. The Secretary also read the proclamation made by order of the court on the 9th and published in certain newspapers. This proclamation [30] was as follows:

The Senate of the United States of America, as the court of impeachment, sitting on the case of West H. Humphreys, judge of the district court of the United States for the several districts of the State of Tennessee.

MONDAY, JUNE 9, 1862.

Ordered, That this high court of impeachment stands adjourned till the 26th day of June, instant, at 12 o'clock meridian; and, as the said West H. Humphreys has failed to make his appearance to answer the said articles of impeachment, though duly summoned, it is further ordered that proclamation for his appearance on that day be made by publishing this order in the National Intelligencer, National Republican, and Evening Star newspapers, printed in the city of Washington, for at least ten days, successively, before said 26th day of June, instant, and also in the Nashville Union newspaper, printed in the city of Nashville, in the State of Tennessee, at least five several days before said 26th day of June, instant.

Attest: J. W. FORNEY,
Secretary of the Senate.

A question being raised as to the proof of the proclamation, the production of copies of the several papers in which it was published was considered sufficient.

Then the following proceedings occurred:

The PRESIDENT pro tempore. The Sergeant-at-Arms will now make proclamation for the appearance of the accused.

The SERGEANT-AT-ARMS. Oyez! Oyez! Oyez! West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, come forward and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

No response being made,

The PRESIDENT pro tempore. The accused West H. Humphreys being in default, not appearing in pursuance of the summons or proclamation, the managers on the part of the United States House of Representatives are now at liberty to proceed in support of the articles of impeachment exhibited against him.

Mr. BINGHAM. Mr. President, on behalf of the managers for the House of Representatives, I ask that the returns of the Sergeant-at-Arms to the subpoenas issued for witnesses in support of this impeachment may be reported, and the names of the witnesses called over and those present recorded.

The Secretary then read the returns on the subpoenas, and the names of the witnesses were called on motion of Mr. Manager Bingham. The witnesses were assigned seats on the left of the chair, in the rear of the seats usually occupied by Senators.

Among the witnesses called was Andrew Johnson, who failed to respond. Mr. Bingham, of the managers, stated that Mr. Johnson was detained by his duties as governor of Tennessee, and moved that he be excused from obeying the process of the court. This motion was unanimously agreed to.

2395. Humphreys' impeachment, continued.

In the Humphreys trial, with no representative for the respondent, witnesses were not cross-examined.

The respondent not being represented in the Humphreys trial, the managers, without argument, demanded judgment.

[30] Journal, pp. 895, 896; Globe, p. 2943.

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In the absence of representation of respondent in the Humphreys trial, the Senators insisted on the rules of evidence.

Mr. Train then opened the case for the managers, outlining at not great length what it was proposed to prove.

Mr. Bingham, for the managers, then proceeded to offer evidence, documentary and oral, witnesses being sworn, in accordance with the rule, by the Secretary.

The witnesses were then examined by the managers.[31] There was no cross-examination, as there was not appearance for Judge Humphreys. At the close of each witness's testimony the President pro tempore announced that any Senator might propose a question by reducing it to writing and having it read by the Secretary. But no questions were proposed.

Twice objection was made by Senators to questions put by the managers, as eliciting testimony inadmissible as evidence, but either the question or the objection was withdrawn without a decision by the court.[32]

At the conclusion of the testimony Mr. Bingham stated that the managers did not deem it necessary to introduce further testimony or to submit argument; and he respectfully demanded of the court, in the name of all the people of the United States, a judgment of guilty, in manner and form as prescribed by the Constitution of the United States.

2396. Humphreys' impeachment continued.

The decision of the court on the articles in the Humphreys case was guilty as to a portion of the articles.

Form of question on verdict of the court in the Humphreys trial.

Various Senators were excused from voting on the judgment in the Humphreys case.

The presiding officer ruled that testimony might not be read during the voting on the articles impeaching Judge Humphreys.

By unanimous consent, in the Humphreys trial a Senator was permitted to vote after the decision on the articles had been declared.

Then, by direction of the President pro tempore, the articles of impeachment were read one by one, and at the conclusion of the reading of each article the President pro tempore took the opinion of the members of the court,[33] respectively, in the form following:

> Mr. Senator ———, how say you? Is the accused, West H. Humphreys, guilty or not guilty of the high crimes and misdemeanors as charged in this article of impeachment?

And the Senators having answered, the President declared West H. Humphreys guilty or not guilty of the charge, according as two-thirds voted him guilty or failed to do so.

Very frequently a Senator would give a brief explanation of his reason for his vote, and several Senators were by vote excused from voting on a particular article, reasons in each case being assigned as absence when the testimony was given or inability to hear the testimony.

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[31] Globe, pp. 2944–2949.
[32] Globe, p. 2946.
[33] Senate Impeachment Journal, pp. 897–903; Globe, pp. 2949, 2950.

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In voting on the second specification of the sixth article Mr. Preston King, of New York, asked that the testimony in support of the specification be referred to.

The President pro tempore [34] said:

That proceeding is entirely put of order at this stage.

The sixth article containing several specifications, a vote was taken separately on each one at the suggestion of a Senator and by direction of the President pro tempore.

The vote was as follows:

	Guilty.	Not Guilty.
Article 1	39	0
Article 2	36	1
Article 3	33	4
Article 4	28	10
Article 5	39	0
Article 6, specification 1	36	1
Article 6, specification 2	12	24
Article 6, specification 3	35	1
Article 7	35	1

Mr. James H. Lane, of Kansas, was by unanimous consent permitted to record his vote after the results had been announced and declared.[35]

On motion of Mr. Foster it was—

Ordered, That the court take a recess until 4 o'clock p.m., at which hour the court will proceed to pronounce judgment in the case of West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee.

2397. Humphreys' impeachment, continued.

The court declined to consider in secret session the question of final judgment in the Humphreys case.

Having found Judge Humphreys guilty, the court proceeded to pronounce judgment of removal and disqualification.

The presiding officer held that the question on removal and disqualification was divisible.

Debate as to whether or not the Constitution requires both removal and disqualification on conviction by impeachment.

Form of judgment pronounced by the presiding officer in the Humphreys trial.

Judgment being pronounced in the Humphreys case, the court adjourned without delay.

The judgment of the court in the Humphreys trial was communicated to the House by the report of the chairman of the Committee of the Whole.

The Senate ordered an attested copy of the court's decision in the Humphreys case to be sent to the President of the United States.

The high court met again at 4 p.m., and the House was informed by message that the court was ready to pronounce judgment and requested the attendance of the House of Representatives.[36]

Before the arrival of the Members of the House Mr. Edgar Cowan, of Pennsylvania, suggested [37] a short secret session; but Mr. John P.

[34] Solomon Foot, of Vermont, President pro tempore.
[35] Globe, p. 2951.
[36] House Journal, p. 943.
[37] Globe, p. 2951.

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Hale, of New Hampshire, suggested that the rule required the doors to be kept open. Mr. Cowan suggested that the rule referred only to the trial and not to proceedings relating to the verdict.

The President pro tempore said he would entertain a motion for a secret session, but Mr. Cowan did not insist on it.

The House of Representatives having entered the Chamber, Mr. Foster offered [38] the following as an interrogation to be put to each member of the court in order that judgment might be perfected.

Is the court of the opinion that West H. Humphreys be removed from the office of judge of the district court of the United States for the district of Tennessee?

To this Mr. Lyman Trumbull, of Illinois, offered an amendment as follows:

Add thereto: "and be disqualified to hold and enjoy any office of honor, trust, or profit under the United States."

Mr. Trumbull quoted the Constitution to show that both removal from office and disqualification should be the punishment.

Mr. Foster explained that the question proposed was in exactly the form used in the case of Judge Pickering, and that it was the only question propounded in rendering that judgment.

After debate, Mr. Trumbull's amendment was agreed to, yeas 27, nays 10.

Thereupon, Mr. Garrett Davis, of Kentucky, asked for a division of the question.

Upon this demand there was debate. Mr. Trumbull said:

I have very serious doubts whether it is a double question; whether the whole is not one judgment. "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." I am not sure but that when the Constitution says it shall not extend further than that, it necessarily follows that it shall extend that far. It is not in the alternative, and I am by no means satisfied that that consequence does not necessarily follow the conviction. It is a limitation. As is well suggested by my friend from Pennsylvania [Mr. Wilmot], could you impose that latter part without the former? Could you decide that he should be disqualified to hold and enjoy any office of honor, trust, or profit? If each proposition is independent, it must be able to stand by itself without affecting any other. I am by no means satisfied that these are independent propositions. It seems to me that altogether the safer way is to take the question on them together.

Mr. Jacob Collamer, of Vermont, said:

Mr. President, I take it the test of the divisibility of a question depends upon whether there can be a vote left after it is divided, let the first be decided as it may. That is the criterion; that, if after you have voted "yea" or "nay" upon the first article of division, there is still a question to be decided if the decision be either way. Now, in this case, suppose the proposition to be that this man be deprived of office, and that he be rendered ineligible, and it is divided, and the vote shall be that he be not deprived of his office; is there anything left? There would be nothing left to vote on, because the rendering him ineligible hereafter is only a consequence of the first, and rests in judicial discretion whether we put it on or not. It is not, in my apprehension, divisible, because a vote in one way on the first branch would render it impossible to get along with the second.

Mr. O. H. Browning, of Illinois, said:

We have the authority of an adjudicated case of the action of the Senate, in which they found a judge guilty upon impeachment and entered against him a judgment of ouster from his office; going no further. I apprehend it was competent for them to do that. They were not bound to attach to it the other con-

[38] Senate Impeachment Journal, pp. 903, 904; Globe, pp. 2951–2953.

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sequence that may be attached to it under the Constitution, of disqualification forever thereafter to hold office. It may frequently occur—it occurred in that case, it may occur again—that a majority of the Senators would feel it their duty to vote for his ouster from office, and would not feel it their duty to vote for his disqualification forever thereafter to hold any other office under the Government, however unimportant. If you are compelled to put the question, and the whole question, as one question—to put it all together—men who are unwilling to vote to disqualify him forever, disfranchise him forever, will be constrained to vote that he be ousted from office, and also to vote for another proposition, which in their judgments would be unjust. That would follow inevitably; and after you had taken the question on them jointly, I apprehend you could not return and divide them, and take the propositions separately, so as to say whether he should be ousted from office.

The President pro tempore [39] said:

In the judgment of the Chair these are separate and divisible propositions. * * * From the authority of the Pickering case the Chair is obliged to say that it is a divisible proposition.

The question was then taken on the first proposition, and it was determined in the affirmative, yeas 38, nays 0.

On the second branch of the question there appeared, yeas 36, nays 0.

The President pro tempore thereupon pronounced the judgment of the court, as follows:

This court, therefore, do order and decree, and it is hereby adjudged: That West H. Humphreys, judge of the district court of the United States for the eastern, middle, and western districts of Tennessee, be and he is removed from his said office; and that he be and is disqualified to hold and enjoy any office of honor, trust, or profit, under the United States.

Then, on motion of Mr. Foster, the court adjourned without day.

On the same day, the Committee of the Whole House having returned to Representatives Hall, the Committee of the Whole rose, and the Speaker having resumed the chair, Mr. E. B. Washburne, of Illinois, the Chairman, reported—

that the committee had, according to order, attended the trial by the Senate of the said impeachment; and that the said West H. Humphreys, judge of the district court of the United States for the several districts of Tennessee, had been found guilty by the Senate of the matter whereof he stood charged by the House of Representatives, as contained in its articles of impeachment exhibited against him.[40]

In the Senate, on June 27,[41] on motion of Mr. Foster, it was,

Ordered, That the Secretary lay before the President of the United States an attested copy of the judgment of the Senate as the high court of impeachment in the case of West H. Humphreys.

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[39] Solomon Foot, of Vermont, President pro tempore.
[40] House Journal, pp. 943, 944.
[41] Senate Journal, p. 718; Globe, p. 2957.

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The First Attempts To Impeach the President*

1. Refusal of the House to impeach President Tyler. Section 2398.
2. First proposition to impeach President Johnson. Section 2399.
3. Investigation of charges made by a Member. Sections 2400–2402.
4. Proceedings and report of investigating committee. Section 2403.
5. Usurpation of power as an impeachable offense. Section 2404.
6. Nature of the power of impeachment elaborately discussed. Sections 2405, 2406.
7. House decides not to impeach. Section 2407.

2398. The House refused in 1843 to impeach John Tyler, President of the United States, on charges preferred by a Member.

A proposition to impeach a civil officer of the United States is received in the House as a question of privilege.

Form of impeachment of a civil officer by a Member on the floor of the House.

On January 10, 1843,[1] Mr. John M. Botts, of Virginia, proposed the following:

I do impeach John Tyler, Vice-President, acting as President of the United States, of the following high crimes and misdemeanors:

First. I charge him with gross usurpation of power and violation of law, in attempting to exercise a controlling influence over the accounting officers of the Treasury Department, by ordering the payment of accounts of long standing that had been by them rejected for want to legal authority to pay, and threatening them with expulsion from office unless his orders were obeyed; by virtue of which threat thousands were drawn from the Public Treasury without the authority of law.

Second. I charge him with a wicked and corrupt abuse of the power of appointment to and removal from office: First, in displacing those who were competent and faithful in the discharge of their public duties, only because they were supposed to entertain a political preference for another; and, secondly, in bestowing them on creatures of his own will, alike regardless of the public welfare and his duty to the country.

Third. I charge him with the high crime and misdemeanor of aiding to excite a disorganizing and revolutionary spirit in the country, by placing on the records of the State Department his objections to a law as carrying no constitutional obligation with it; whereby the several States of this Union were invited to disregard and disobey a law of Congress which he himself had sanctioned and sworn to see faithfully executed, from which nothing but disorder, confusion, and anarchy can follow.

Fourth. I charge him with being guilty of a high misdemeanor, in retaining men in office for months after they have been rejected by the Senate as unworthy, incompetent, and unfaithful, with an utter defiance of the public will and total indifference to the public interests.

Fifth. I charge him with the high crime and misdemeanor of withholding his assent to laws indispensable to the just operations of government, which involved

*Hind's Precedents, vol. 3, p. 821 (1907).
[1] Third session Twenty-seventh Congress, Journal, pp. 157–163; Globe, pp. 144–146.

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no constitutional difficulty on his part; of depriving the Government of all legal means of revenue, and of assuming to himself the whole power of taxation, and of collecting duties of the people without the authority or sanction of law.

Sixth. I charge him with an arbitrary, despotic, and corrupt abuse of the veto power, to gratify his personal and political resentments against the Senate of the United States for a constitutional exercise of their prerogative in the rejection of his nominees to office, with such evident marks of inconsistency and duplicity as leave no room to doubt his disregard of the interests of the people and his duty to the country.

Seventh. I charge him with gross official misconduct, in having been guilty of a shameless duplicity, equivocation, and falsehood with his late Cabinet and Congress, which led to idle legislation and useless public expense, and by which he has brought such dishonor on himself as to disqualify him from administering the Government with advantage, honor, or virtue, and for which alone he would deserve to be removed from office.

Eighth. I charge him with an illegal and unconstitutional exercise of power, in instituting a commission to investigate past transactions under a former Administration of the custom-house in New York, under the pretense of seeing the laws faithfully executed; with having arrested the investigation at a moment when the inquiry was to be made as to the manner in which those laws were executed under his own Administration; with having directed or sanctioned the appropriation of large sums of the public revenue to the compensation of officers of his own creation, without the authority of law, which, if sanctioned, would place the entire revenues of the country at his disposal.

Ninth. I charge him with the high misdemeanor of having withheld from the Representatives of the people information called for and declared to be necessary to the investigation of stupendous frauds and abuses alleged to have been committed by agents of the Government, both upon individuals and the Government itself, whereby he himself became accessory to these frauds.

Mr. Botts also submitted this resolution, for the action of the House:

Resolved, That a committee of nine members be appointed, with instructions diligently to inquire into the truth of the preceding charges preferred against John Tyler, and to report to this House the testimony taken to establish said charges, together with their opinion whether the said John Tyler hath so acted in his official capacity as to require the interposition of the constitutional power of this House; and that the committee have power to send for persons and papers.

Mr. Botts stated in his place as a Member that he was himself able to prove every charge made, and he not only asked but demanded the opportunity to do so.

The Speaker[2] 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,[3] Mr. James M. Ashley, of Ohio, moved that the rules be suspended so as to enable him to report from the Committee on Territories[4] the following resolution:

Resolved, That a select committee to consist of seven Members of this House be appointed by the Speaker, whose duty it shall be to inquire whether any acts have been done by any officer of the Government of the United States which in contemplation of the Constitution are high crimes or misdemeanors, and whether said acts were designed or calculated to overthrow, subvert, or corrupt

[2] John White, of Kentucky, Speaker.
[3] Second session Thirty-ninth Congress, Journal, p. 89; Globe, p. 154.
[4] At that time reports could not be made at any time.

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the Government of the United States, or any department thereof, and that said committee have power to send for persons and papers and to administer the customary oath to witnesses, and they have leave to report by bill or otherwise.

In the brief debate permitted objection was made to such a general inquest on all the officers of the United States. On the vote there appeared yeas 90, nays 49. So the rules were not suspended.

On January 7, 1867,[5] in the morning hour for the presentation of resolutions,[6] Mr. Benjamin F. Loan, of Missouri, submitted this resolution:

Resolved, That for the purpose of securing the fruits of the victories gained on the part of the Republic during the late war, waged by rebels and traitors against the life of the nation, and of giving effect to the will of the people as expressed at the polls during the recent elections by a majority numbering in the aggregate more than 400,000 votes, it is the imperative duty of the Thirty-ninth Congress to take without delay such action as will accomplish the following objects:

1. The impeachment of the officer now exercising the functions pertaining to the office of President of the United States of America, and his removal from said office upon his conviction, in due form of law, of the high crimes and misdemeanors of which he is manifestly and notoriously guilty, and which render it unsafe longer to permit him to exercise the powers he has unlawfully assumed.
2. To provide for the faithful and efficient administration of the executive department of the Government within the limits prescribed by law.
3. To provide effective means for immediately reorganizing civil government in those States lately in rebellion, excepting Tennessee, and for restoring them to their practical relations with the Government upon a basis of loyalty and justice; and to this end.
4. To secure by the direct intervention of Federal authority the right of franchise alike, without regard to color, to all classes of loyal citizens residing within those sections of the Republic which were lately in rebellion.

After some discussion this resolution was, under the requirements of a rule of the House, referred to the Committee on Reconstruction.

Immediately thereafter Mr. John R. Kelso, of Missouri, offered as a new proposition the first portion of the resolution, having stricken out all of subdivisions 3 and 4.

Mr. Thomas T. Davis, of New York, moved to lay the resolution on the table, and the motion was disagreed to, yeas 40, nays 104. The question was then put on ordering the previous question, when the morning hour expired, and the House proceeded to other business.

2400. The first attempt to impeach President Johnson, continued.

On January 7, 1867, President Johnson was formally impeached in the House on the responsibility of a Member.

The House voted to investigate the conduct of President Johnson on the strength of charges made by a Member on his own responsibility only.

A Member having impeached the President and presented a resolution of investigation the Speaker admitted it as a question of privilege.

In the first attempt to impeach President Johnson the investigation was made by the Judiciary Committee.

On the same day, January 7,[7] Mr. James M. Ashley, of Ohio, rising in his place, declared:

On my responsibility as a Representative, and in the presence of this House, and before the American people, I charge Andrew Johnson, Vice-President and

[5] Journal, pp. 118, 119; Globe, pp. 319–321.
[6] This order of business does not now exist.
[7] Journal, pp. 121–124; Globe, pp. 320, 321.

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acting President of the United States, with the commission of acts which, in contemplation of the Constitution, are high crimes and misdemeanors. I therefore submit the following—

which was presented as a question of privilege:

I do impeach Andrew Johnson, Vice-President and acting President of the United States, of high crimes and misdemeanors.

I charge him with a usurpation of power and violation of law:

In that he has corruptly used the appointing power.

In that he has corruptly used the pardoning power.

In that he has corruptly used the veto power.

In that he has corruptly disposed of public property of the United States.

In that he has corruptly interfered in elections, and committed acts which, in contemplation of the Constitution, are high crimes and misdemeanors: Therefore,

Be it resolved, That the Committee on the Judiciary be, and they are hereby, authorized to inquire into the official conduct of Andrew Johnson, Vice-President of the United States, discharging the powers and duties of the office of President of the United States, and to report to this House whether, in their opinion, the said Andrew Johnson, while in said office, has been guilty of acts which were designed or calculated to overthrow, subvert, or corrupt the Government of the United States, or any department or officer thereof; and whether the said Andrew Johnson has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors, requiring the interposition of the constitutional power of this House; and that said committee have power to send for persons and papers and to administer the customary oath to witnesses.

A question of order being raised, the Speaker [8] held that the resolution presented a question of privilege.

A motion by Mr. Rufus P. Spalding, of Ohio, that the resolution be laid on the table, was disagreed to—yeas 39, nays 106.

Then the previous question was ordered, and a motion to reconsider the vote whereby it was ordered was laid on the table by a vote of yeas 95, nays 47.

Then the question being put: "Will the House agree to the proposition submitted by Mr. James M. Ashley?" there appeared yeas 108, nays 39. So the resolution was agreed to.

On January 14,[9] Mr. Loan's resolution was debated, Mr. Loan, in a speech at length, using language interpreted to be a charge that President Johnson was guilty of complicity in the murder of President Lincoln, and further charging him with participation in a conspiracy to capture the Government in the interest of the late participants in the secession movement. On January 28 and February 4 the resolution was further considered, the debate on the later days being principally on a motion made by Mr. Thomas A. Jenckes, of Rhode Island, that the resolution be referred to the Committee on the Judiciary, which was already considering the subject.

This motion was agreed to, although it was urged in opposition that there was much business before the Judiciary Committee, and that the matter would be expedited by reference to a select committee.

2401. The first attempt to impeach President Johnson, continued.

The Thirty-ninth Congress having expired during investigation of President Johnson's conduct, the House in the next Congress directed the Judiciary Committee to resume the investigation.

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[8] Schuyler Colfax, of Indiana, Speaker. The Speaker cited as a precedent the decision made in the Twenty-seventh Congress on a point of order made by Mr. Horace Everett, of Vermont.

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

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

On February 28,[10] Mr. James F. Wilson, of Iowa, chairman of the Judiciary Committee, submitted a report which in effect stated that considerable testimony had been taken, but that it would be impracticable to conclude the subject during the then existing Congress; and expressed the opinion that the evidence indicated the desirability of a further prosecution of the case. This report was signed by eight members of the committee. Mr. Andrew J. Rogers, of New Jersey, submitted minority views, in which he declared "that the most of the testimony that has been taken is of a secondary character, and such as would not be admitted in a court of justice," and advised discontinuance of the proceedings.

On March 2 [11] the report was laid on the table and ordered printed.

At the beginning of the next Congress, on March 7, 1867,[12] Mr. James M. Ashley, of Ohio, as a question of privilege, submitted a preamble and resolution, which, after modification, were as follows:

Whereas the House of Representatives of the Thirty-ninth Congress adopted on the 7th of January, 1867, a resolution authorizing an inquiry into certain charges preferred against the President of the United States; and

Whereas the Judiciary Committee, to whom said resolution and charges were referred, with authority to investigate the same, were unable for want of time to complete said investigation before the expiration of the Thirty-ninth Congress; and

Whereas in the report submitted by said Judiciary Committee on the 2d of March, they declare that the evidence taken is of such a character as to justify and demand a continuation of the investigation by this Congress: Therefore, be it

Resolved by the House of Representatives, That the Judiciary Committee when appointed be, and they are hereby, instructed to continue the investigation authorization in said resolution of January 7, 1867, and that they have power to send for person and papers, and to administer the customary oath to witnesses; and that the committee have authority to sit during the sessions of the House, and during any recess which Congress or this House may take.

Resolved, That the Speaker of the House be requested to appoint the Committee on the Judiciary forthwith, and that the committee so appointed be directed to take charge of the testimony taken by the committee of the last Congress; and that said committee have power to appoint a clerk at a compensation not to exceed $6 per day, and employ the necessary stenographer.

Resolved further, That the Clerk of the House of Representatives be directed to pay, out of the contingent fund of the House, on the order of the Committee on the Judiciary, such sum or sums of money as may be required to enable the said committee to prosecute the investigation above directed, and such other investigations as it may be ordered to make.

Mr. Samuel J. Randall, of Pennsylvania, having raised a question as to the presentation of the resolution, the Speaker [13] said:

The Chair has entertained the resolution as a question of privilege, as it has reference to proceedings for the impeachment of the President of the United States.[14]

A motion by Mr. William S. Holman, of Indiana, that the resolutions be laid on the table was disagreed to, yeas 33, nays 119; and then after debate, largely as to the political expediency of reviving the pro-

[10] House Report No. 31; Globe p. 1754.
[11] Journal, p. 585; Globe, p. 1754.
[12] First session Fortieth Congress, Journal, pp. 19–21; Globe, pp. 18–25.
[13] Schuyler Colfax, of Indiana, Speaker.
[14] It is to be noticed that several nonprivileged matters are contained in the resolutions, which under the present practice would destroy the privilege—notably the provisions for a clerk for payments from the contingent fund.

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ceedings, the preamble and resolutions were agreed to by the House, without division.

Throughout this session of Congress, which continued with intermissions until November 30, various resolutions were offered [15] with the object of hastening the work of the Judiciary Committee or of procuring the printing of the testimony. On March 29 a resolution requesting the committee to report within a certain time was agreed to.

2402. The first attempt to impeach President Johnson, continued.

A verbal report as to progress made by a committee in an impeachment investigation was offered as privileged.

A proposition to instruct a committee to investigate new charges in an impeachment case was held to be privileged.

On July 10,[16] Mr. James F. Wilson, of Iowa, claiming the floor for a question of privilege, reported verbally from the Judiciary Committee, by direction of that committee, that they expected to be able to report on or after October 16. He also stated that as the case now stood five members of the committee were of the opinion that such high crimes and misdemeanors had not been developed as to call for the exercise of the impeachment power on the part of the House. The remaining four members of the committee took the opposite view.

On July 17, 1867,[17] Mr. John Covode, of Pennsylvania, claiming the floor for a question of privilege, offered the following preamble and resolution:

> Whereas Andrew Johnson, President of the United States, did, upon the 4th day of July, 1867, at the request of the counsel of John H. Surratt, caused to be issued to Stephen F. Cameron, of the rebel army, and one of the most notorious violators of the laws of war, a full pardon for all his crimes, in order that his credibility might be increased as a witness to aid in the exculpation of said Surratt from his participation in the murder of Mr. Lincoln, thus showing his sympathy with the men who murdered the President: Therefore, be it
>
> *Resolved*, That the Committee on the Judiciary be instructed to inquire into the foregoing charge, and report the evidence to the House in the first week of its next session, together with the testimony already taken in the impeachment case.

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

The Speaker [18] said:

> It does unquestionably, in the opinion of the Chair, present a question of the very highest privilege.

The resolution was then agreed to; but the preamble was amended by striking out all after the word "whereas" and inserting the words: "It is reported that a pardon has been issued by the President to Stephen F. Cameron," and as amended was agreed to.

2403. The first attempt to impeach President Johnson, continued.

The first proposition to impeach President Johnson was reported from a committee divided as to fact and law.

In the first attempt to impeach President Johnson the committee reported the testimony and also majority and minority arguments.

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[15] Journal, pp. 146, 189, 211, 213, 220, 248; Globe, pp. 446, 452, 592, 656, 657, 720, 725, 762, 765, 766, 778, 779.
[16] Globe, p. 565.
[17] Journal, pp. 220, 221; Globe, p. 697.
[18] Schuyler Colfax, of Indiana, Speaker.

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The first investigation of President Johnson's conduct was conducted ex parte and in executive session.

It does not appear that President Johnson sought to be represented before the committee making the first investigation.

Instance wherein a Member of the House not a member of the committee was permitted to examine a witness.

In the first investigation of the conduct of President Johnson the committee relaxed the strict rules of evidence.

On November 25 [19] Mr. George S. Boutwell, of Massachusetts from the Committee on the Judiciary, submitted the report of the majority of that committee, signed by five of the members, while Mr. James F. Wilson, of Iowa, presented minority views signed by himself and Mr. Frederick E. Woodbridge, of Vermont. Also Mr. Samuel S. Marshall, of Illinois, presented other minority views, signed by himself and Mr. Charles A. Eldridge, of Wisconsin.

On motion of Mr. Boutwell,

> *Ordered*, That the said testimony and reports be printed (the report of the majority and the views of the minorities to be printed together), and that the further consideration of the subject be postponed until Wednesday, the 4th day of December next.

The report of the committee presents the testimony in full. It appears that the examination was conducted ex parte, there being no one present to cross-examine witnesses on behalf of the President, nor does it appear that any testimony was introduced at his suggestion or sought to be introduced. The witnesses were examined generally by the chairman or other members of the committee. In one instance [20] Mr. Benjamin F. Butler, a Member of the House, but not a member of the committee, was permitted to examine a witness; but his examination was in no sense an appearance in behalf of the President, but rather the reverse. In the minority views [21] presented by Mr. Marshall the investigation is spoken of as "a secret, ex parte one."

As to the nature of the testimony taken in the course of the investigation, the majority say [22] that they—

> have spared no pains to make their investigations as complete as possible, not only in the explorations of the public archives, but in following every indication that seemed to promise any additional light upon the great subjects of inquiry.

And in the minority views submitted by Mr. Wilson it is stated: [23]

> A great deal of matter contained in the volume of testimony reported to the House is of no value whatever. Much of it is mere hearsay, opinions of witnesses, and no little amount of it utterly irrelevant to the case. Comparatively a small amount of it could be used on a trial of this case before the Senate.

It seems to have been assumed in the committee that this was the proper course, since in the minority views presented by Mr. Marshall it is stated: [24]

> In what we have said of the character of evidence taken before us, and the means used to procure it, we must not be understood as reflecting upon the action of the committee or any member thereof. Such an interpretation of our remarks would do great injustice to us and to them. Whether such latitude

[19] Journal, p. 265; Globe, pp. 791, 792; House Report No. 7, First session Fortieth Congress. Although presented by Mr. Boutwell, this report was prepared principally by Mr. Thomas Williams, of Pennsylvania.
[20] See p. 56 of the testimony.
[21] See p. 110 of the report.
[22] See p. 1 of the report.
[23] See p. 104 of the report.
[24] See p. 110 of the report.

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should have been given in the examination of witnesses we will not now inquire. In an investigation before a committee it would be difficult and perhaps impossible to confine the evidence to such as would be deemed admissible before a court of justice. Indeed, it may be questioned whether it would be proper so to restrict it, and it is perhaps better, even for the President, that those who were managing the prosecution from the outside were permitted to present anything that they might call or consider evidence.

The majority of the committee embodied their conclusion in this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

The minority, taking issue, were united in recommending a resolution as follows:

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the proposed impeachment of the President of the United States, and that the subject be laid upon the table.

The fact that all the minority did not unite in submitting views did not arise from any disagreement as to essential facts or law, but merely as to a difference as to whether or not the conduct of the President should be criticised as improper, although not impeachable.

2404. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson was based on the salient charge of usurpation of power, with many specifications.

The discussion of the committee touched two main branches (1) as to the facts, and (2) as to the law.

1. As to the facts.

In moving the impeachment Mr. Ashley had specified six offenses. The majority of the committee found in general that the evidence sustained these charges, and say that "the great salient point of accusation, standing out in the foreground, and challenging the attention of the country, is usurpation of power." The majority specify as follows:

1. That the President of the United States, assuming it to be his duty to execute the constitutional guaranty, has undertaken to provide new governments for the rebellious States without the consent or cooperation of the legislative power, and upon such terms as were agreeable to his own pleasure, and then to force them into the Union against the will of Congress and the people of the loyal States, by the authority and patronage of his high office.

2. That to effect this object he has created offices unknown to the law, and appointed to them without the advice and consent of the Senate, men who were notoriously disqualified to take the test oath, at salaries fixed by his own mere will, and paid those salaries, along with the expenses of his work, out of the funds of the War Department, in clear violation of law.

3. That to pay the expenses of the said organizations, he has also authorized his pretended officers to appropriate the property of the Government, and to levy taxes from the conquered people.

4. That he has surrendered, without equivalent, to the rebel stockholders of southern railroads captured by our arms, not only the roads themselves, but the rolling stock and machinery captured along with them, and even roads constructed or renovated at an enormous outlay by the Government of the United States itself.

5. That he has undertaken, without authority of law, to sell and transfer to the same parties, at a private valuation, and on a long credit, without any security whatever, an enormous amount of rolling stock and machinery, purchased by and belonging to the United States, and after repeated defaults on the part of the purchasers has postponed the debt due to the Government in order to enable them to pay the claims of other creditors, along with arrears of interest on a large amount of bonds of the companies guaranteed by the State of Tennessee, of which he himself was a large holder at the time.

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6. That he has not only restored to rebel owners large amounts of cotton and other abandoned property that had been seized by the agents of the Treasury, but has presumed to pay back the proceeds of actual sales made thereof at his own will and pleasure, in utter contempt of the law, directing the same to be paid into the Treasury, and the parties aggrieved to seek their remedy in the courts, and in manifest violation of the true spirit and meaning of that clause of the Constitution of the United States which declares that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."

7. That he has abused the pardoning power conferred on him by the Constitution, to the great detriment of the public, in releasing, pending the condition of war, the most active and formidable of the leaders of the rebellion, with a view to the restoration of their property and means of influence, and to secure their services in the furtherance of his policy; and, further, in substantially delegating that power for the same objects to his provisional governors.

8. That he has further abused this power in the wholesale pardon, in a single instance, of 193 deserters, with restoration of their justly forfeited claims upon the Government for arrears of pay, without proper inquiry or sufficient evidence.

9. That he has not only refused to enforce laws passed by Congress for suppression of the rebellion, and the punishment of those who gave it comfort and support, by directing proceedings against delinquents and their property, but has absolutely obstructed the course of public justice by either prohibiting the initiation of legal proceedings for that purpose, or where already commenced, by staying the same indefinitely, or ordering absolutely the discontinuance thereof.

10. That he has further obstructed the course of public justice, by not only releasing from imprisonment an important state prisoner, in the person of Clement C. Clay, charged among other things, as asserted by himself in answer to a resolution of the Senate (Ex. Doc., Thirty-ninth Congress, No. 7), "with treason, with complicity in the murder of Mr. Lincoln, and with organizing bands of pirates, robbers, and murderers in Canada, to burn the cities and ravage the commercial coasts of the United States on the British frontier," but has even forbidden his arrest in proceedings instituted against him for treason and conspiracy, in the State of Alabama, and ordered his property, when seized for confiscation by the district attorney of the United States, to be restored.

11. That he has abused the appointing power lodged in him by the Constitution:

"1. In the removal, on system, and to the great prejudice of the public service, of large numbers of meritorious public officers, for no other reason than because they refused to indorse his claim of the right to reorganize and restore the rebel States on conditions of his own, and because they favored the jurisdiction and authority of Congress on the premises.

"2. In reappointing in repeated instances, after the adjournment of the Senate, persons who had been nominated by him and rejected by that body as unfit for the place for which they had been so recommended."

12. That he has exercised the dispensing power over the laws, by commissioning revenue officers and others unknown to the law, who were notoriously disqualified by their participation in the rebellion from taking the oath of office required by the act of Congress of July 2, 1862, allowing them to enter upon and exercise the duties appertaining to their respective offices, and paying to them salaries for their services therein.

13. That he has exercised the veto power conferred on him by the Constitution, in its systemmatic application to all the important measures of Congress looking to the reorganization and restoration of the rebel States, in accordance with a public declaration that he "would veto all its measures whenever they came to him," and without other reasons than a determination to prevent the exercise of the undoubted power and jurisdiction of Congress over a question that was cognizable exclusively by them.

14. That he has brought the patronage of his office into conflict with the freedom of elections by allowing and encouraging his official retainers to travel over the country, attending political conventions and addressing the people, instead of attending to the duties which they were paid to perform, while they were receiving high salaries in consideration thereof.

15. That he has exerted all the influence of his position to prevent the people of the rebellious States from accepting the terms offered to them by Congress, and neutralized to a large extent the effects of the national victory by impressing them with the opinion that the Congress of the United States was bloodthirsty and implacable and that their only hope was in adhering to him.

16. That, in addition to the oppression and bloodshed that have everywhere resulted from his undue tenderness and transparent partiality for traitors, he

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has encouraged the murder of loyal citizens in New Orleans by a Confederate mob pretending to act as a police, by hireling correspondence with its leaders, denouncing the exercise of the constitutional right of a political convention to assemble peacefully in that city as an act of treason proper to be suppressed by violence, and commanding the military to assist instead of preventing the execution of the avowed purpose of dispersing them.

17. That he has been guilty of acts calculated, if not intended, to subvert the Government of the United States by denying that the Thirty-ninth Congress was a constitutional body and fostering a spirit of disaffection and disobedience to the law and rebellion against its authority by endeavoring, in public speeches, to bring it into odium and contempt.

The minority of the committee generally dissent from the conclusions of the majority as to the facts. After reviewing the six specifications alleged by Mr. Ashley, they find from a review of the evidence that the acts of the President bear a very different construction from that given by the majority. Messrs. Wilson and Woodbridge admit that many of his acts have been wrong politically, saying:

In approaching a conclusion we do not fail to recognize two standpoints from which this case may be reviewed: The legal and the political. Viewing it from the former, the case upon the law and the testimony fails; viewing it from the latter, the case is a success.

They then go on to state generally that the President

has disappointed the hopes and expectations of those who placed him in power. He has betrayed their confidence and joined hands with their enemies. * * * Judge him politically, we must condemn him. But the day of political impeachments would be a sad one for this country.

But Messrs. Marshall and Eldridge dissent from all criticism of the President, and confine themselves to the simple finding that on the law and the facts he may not be impeached.

2405. The first attempt to impeach President Johnson, continued.

Whether or not an offense must be indictable under a statute in order to come within the impeaching power was discussed fully in the first attempt to impeach President Johnson.

Discussion of the nature of the impeaching power with reference to American and English precedents.

2. As to the law.

On this point the majority, composed of Messrs. Boutwell; Francis Thomas, of Maryland; Thomas Williams, of Pennsylvania; William Lawrence, of Ohio, and John C. Churchill, of New York, advocate one view, and the united minority a radically different one.

The majority first review the English authorities as set forth in May's work and the utterances of Cushing, Story, and Rawle to show that the purpose of impeachment in modern times is the punishment of high crimes and misdemeanors, chiefly of an official or political character, which are either beyond the reach of the law or which no other authority in the State but the supreme legislative power is competent to prosecute. The Federalist is also quoted to show that such offenses are of a nature which may be denominated political, as they relate chiefly to injuries done immediately to the society itself. The question then arises as to whether the terms of the United States Constitution are such as to change the view which has been taken in England. The majority say in this connection:

The fourth section of its second article provides that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of high crimes and misdemeanors."

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It therefore names but two offenses specifically, and they are not charged here. Do the facts involved fall, then, within the general description of "other high crimes and misdemeanors," or are they excluded by the enumeration?

It is insisted, for the first time, we think, that they do not come within the meaning of the language used, because, although all confessedly in the popular sense the highest and gravest of misdemeanors, and many of them in the technical and common-law signification of the terms, indictable as such in England, and perhaps in most of the older States, they are neither crimes nor misdemeanors here, because it has been held with much diversity of opinion on the bench, and more at the bar, that there is no jurisdiction in the courts of the United States to punish criminally except where an act has been made indictable by statute, which, as the committee are constrained to think, is not a necessary logical result, even if the doctrine were incontrovertible and to be considered as no longer open to discussion in the courts. It would not follow, as they suppose, that what was undoubtedly a crime or misdemeanor at the common law, in view of the framers of the Constitution who sat under it and used its language and recurred so often to its principles, had become any the less a crime before the highest court for the purposes of impeachment because another tribunal, having no jurisdiction at all over the subject, may have decided that it is no longer cognizable before them, even if it were essential, as there is no authority to show, that it should be a true crime within the meaning of the common law. There is a law of Parliament, which is a part of the common law, and by which only this question must be determined.

The objection has the merit at least of being a novel as well as a subtle one; well enough, perhaps, for the range of a criminal court, but too subtle by far for those canons of interpretation that are supposed to rule in the construction of the fundamental law of a great state. If it be a sound one, then there is no remedy in the Constitution but for the specific offenses of treason and bribery, as there was no such thing as what it describes as "high crimes or misdemeanors" then known to the laws of the United States, and the Government must perish whenever it is attacked from a quarter that could have been foreseen. But could the statesmen who framed the Constitution have perpetrated so grave a blunder as this? Did they intend, instead of anchoring that power to the rock by a precision that should fix it there, and leave nothing open to construction, to leave it all afloaat for future Congresses to say what offenses should be from time to time impeachable? Did they, when dealing with a question so mighty as the safety of the state, use words without a meaning, except what might be thereafter given to them by an ephemeral legislature or invented by an uncertain and not always consistent court? Or did they stand in the august presence and under the not uncertain light of the common law of England, which they had claimed as their birthright, speaking the language, with a thorough understanding of its import, of the sages and statesmen who had illustrated its principles? Are their oracles to be read as they would have been in England or would be now in any of its colonies past or present or are their solemn utterances to be measured by a language that they did not know? They committed no such error, and the suggestion that they did is one that does not seem to antedate the case to which it is at present applied.

To ascertain the meaning of the terms in question there are but three possible sources to which the explorer can recur, and they are the Constitution itself, the statutes, and the parliamentary practice, or the common law of which it is a part. The Constitution, however, goes no further, as already shown, than to declare the two political offenses of treason and bribery to be "high crimes and misdemeanors," and as such impeachable, while no statute has ever attempted it. Nor does it by any means follow that where an offense has been made so punishable as a crime the right to impeach is a corollary. It is not every offense that by the Constitution is made impeachable. It must be not a crime or misdemeanor only, but a "high" one, within the meaning of the law of Parliament. There are, moreover, as suggested by Judge Story in his Commentaries, many offenses of great enormity which are made punishable by statute only when committed in a particular place. What is to be said of them? Are they impeachable if committed under one jurisdiction, and not so if perpetrated under another? There are, too, many others of a purely political character, which have been held again and again to be impeachable, that are not even named in our statute books, and many more may be imagined in the long future for which it would be impossible for human sagacity or perspicuity to provide. There is no alternative, then, left, unless the remedy is to fail altogether, except to resort to the parliamentary practice and

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the common law, or leave the whole subject in the discretion of the Senate, which would be inadmissible, of course, in a government of law.

The argument asserts that the offense must be an indictable one by statute to authorize an impeachment. It is not even admitted, however, that this high and radical and only effective remedy for official delinquencies—and in this country, at least, it is no more than that—is to be confined to those offenses which are known by these terms, within the technical meaning that has been assigned to them. In such a case as this no narrow interpretation can be allowed to defeat the object of the law. A constitution of government is always to be construed in a broad, catholic sense, in order to suppress the possible mischief and advance the remedy. Those who maintain this doctrine strangely forget that there is a parliamentary sense, which conforms to the popular one, and is as much a common-law sense as the one on which they rely. The object of the law is not to punish crime. That duty is assigned to other tribunals. The purpose here is only to remove the officer whose public conduct has been such as to disqualify him for the proper discharge of his functions, or to show that the safety of the state—which is always the supreme law—requires that he should be deposed. It refers not so much to moral conduct as to official relations—not, indeed, to moral conduct at all, except so far as it may bear on the performance of official duty. The judgment is not fine or imprisonment, as it may be in England, but only removal from office and disqualification for the future. One of the very objects of this extraordinary tribunal, as has been shown already and will be further enforced hereafter, is to reach those very cases of official delinquency against which no human foresight could provide and which the ordinary tribunals are inadequate to punish. No ingenuity of invention, no fertility of resource, can hedge round a high public officer by boundaries which the greater ingenuity of fraud or wickedness may not be able to pass by sap or scale. If a President, it may be that he may prove impracticable. He may ignore the law, and even wage war on the power that is intrusted with the making of it. He may nullify its acts by misconstruing or disregarding them or denying their authority. He may be guilty of offenses which are in their very nature calculated to subvert the Government—all which things Andrew Johnson is shown clearly to have done. And yet these things, although high misdemeanors against the state, and fraught with peril to its life, may not be indictable as crimes. But will anybody say that the Constitution affords no remedy—that the arch offender must be borne with, and the state must die—merely because Congress has failed to provide, not the same, but a different punishment for the same offense? The cases in England show that this is not law there, as it is not reason, which is said to be the life of the law. The cases here, though all of offenses that were not statutory crimes or misdemeanors, have been so few as to leave this question open, to be decided hereafter upon those great reasons of state that lie at the foundation of the law of Parliament, which is the rule that must govern ultimately here.

The report then goes on to quote from the works of Story and Curtis in support of the view just advanced, and to the effect that, as said by Story, "the offenses to which the power of impeachment has been and is ordinarily applied as a remedy are of a political character," "growing out of personal misconduct, or gross neglect or usurpation, or habitual disregard of the public interests in the discharge of the duties of political office;" and, as said by Curtis, that "although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for a crime."

Further the report quotes the following from Judge Story:

The Congress of the United States has itself unhesitatingly adopted the conclusion that no previous statute is necessary to authorize an impeachment for any official misconduct, and the rules of proceeding and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage * * * In the few cases of impeachment that had theretofore been tried no one of the charges had rested on any statutable misdemeanor.

The report then says:

When he wrote the cases had been only three. In the first, which was that of Blount, in 1798, where the charge was of a conspiracy to invade the territories of a friendly power, although there was no decision on the merits, the impeach-

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able character of the offense was affirmed by an almost unanimous vote of the Senate, expelling the delinquent from that body as having been guilty of a high misdemeanor in the very language of the Constitution. The second (Pickering's), in which a conviction took place, was against a judge of a district court and purely for official misconduct. The third (Chase's) was against a judge of the Supreme Court of the United States, and was also a charge of official misconduct, but terminated in an acquittal. It is a noteworthy fact, however, that in the last-named case (the only one in which the point was raised) it was conceded by the answer that a civil officer was impeachable for "corruption, or some high crime or misdemeanor, consisting in some act done or committed in violation of a law commanding or forbidding it." Two other cases have occurred since that time. The first, that of Judge Peck, in December, 1830, was for punishing a refractory barrister for contempt, as for "an arbitrary, unjust, and oppressive arrest and sentence, with intent to injure and oppress under cover of law." The case was clearly not of an indictable offense under any statute of the United States, but, though defended by the very ablest counsel (Messrs. Wirt and Meredith), it did not seem to have occurred to them that the offense charged was not impeachable within the meaning of the Constitution. The other, that of Judge Humphreys, at the commencement of the rebellion, was upon charges of disloyal acts and utterances, some of which clearly did not set forth offenses indictable by statute of the United States, and yet upon all those charges, with one exception only, he was convicted and removed.

It is only necessary to add that the conclusion of Judge Story upon the whole case is that "it seems to be the settled doctrine of the high court of impeachment that, though the common law can not be the foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law, and that what are and what are not 'high crimes and misdemeanors' is to be ascertained by a recurrence to that great basis of American jurisprudence." And he adds to this that "the power of the House to punish contempts, which are breaches of privilege not defined by positive law, has been upheld on the same ground; for if the House had no jurisdiction to punish until the acts had been prevously ascertained and defined by positive law, it is clear that the process of arrest would be illegal."

And this, it is hoped, will dispose forever of the novel objection that is now interposed in the path of the nation's justice in the defense of its greatest offender, and in a case that has no parallel in enormity in the parliamentary history of England. It is scarcely necessary to repeat that the charges, resting mainly upon record evidence, are not only of usurption and abuse of admitted power, but of a contempt of law and of the legislative power that transcends anything in the annals of either the Tudors or the Stuarts.

It may be answered, however, as it has been, that all this was with the best intent, and that positive corruption must be shown to make the act impeachable. The President alleges a necessity, in one case, of dispensing with the laws in consequence of the absence of Congress. The Attorney-General insists that it was not the true policy of the country to enforce the laws against the rebels, and he accordingly refuses to do it. The Secretary of the Treasury holds the same opinion also as to the subject of captured and abandoned property, and he returns the proceeds, as the President returns the property itself.

An old but homely proverb says that the place most dreaded by the wicked is paved with good intentions. If such intentions, or even a supposed necessity, could excuse the violation of the law, no transgressor would ever be punished, and no tyrant fail to show that what he had done was with the best designs and for the purpose of saving the constitution of the state. If Andrew Johnson can plead that he gave away or sold the public property to rebels to promote their commerce, or that he dispensed with the test oath only to conciliate the disaffected, or collect the revenue, because of the absence of that Congress which he had refused to convene, the self-willed James II might even with a better grace have asserted that he had dispensed with the religious test in the interests of universal toleration. By way, however, of disposing of this apology, it may not be amiss to cite a few authorities:

"The rule is, that if a man intends to do what he is conscious the law—which every one is conclusively presumed to know—forbids, there need not be any other evil intention. (Bish. Crim. Law, sec. 428; 11 S. and R., 325.) It is of no avail to him that he means at the same time an ultimate good." (Ibid.)

"When the law imposes a prohibition it is not left to the discretion of the citizen to comply or not. He is bound to do everything in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be

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instant and imminent. It must be such as to leave him without hope by ordinary means to comply with the requisitions of the law." (Fir. Story, I; 1 Gall., 150 S. P.; 3 Wheat, 39; 1 Bish., sec. 449.)

"Whenever the law, statutory or common, casts on one a duty of a public nature, any neglect of the duty or act done in violation of it is indictable." (1 Bish., sec. 389–537.)

The only remaining question is whether, in view of all these facts, it will be the duty of this House to call the President to answer before the Senate, or whether any consideration of mere public or party expediency, on either side of the House, ought to be allowed to prevail on them to let the accused go free.

2406. The first attempt to impeach President Johnson, continued.

In the first attempt to impeach President Johnson, the minority of the Judiciary Committee held that an indictable offense must be charged.

Elaborate discussion of meaning of the words "high crimes and misdemeanors."

American and English precedents were reviewed carefully by the minority of the Judiciary Committee in the first attempt to impeach President Johnson.

The minority views take issue with the argument of the majority, beginning the argument as follows:

The Constitution of the United States declares that "the House of Representatives * * * shall have the sole power of impeachment." What is the nature and extent of this power? Is it as boundless as it is exclusive? Having the sole power to impeach, may the House of Representatives lawfully exercise it whenever and for whatever a majority of the body may determine? Is it a lawless power, controlled by no rules, guided by no reason, and made active only by the likes or dislikes of those to whom it is intrusted? Have civil officers of the United States nothing to insure them against an exercise of this power except an adjustment of their opinions and official conduct to the standard set up by the dominant party in the House of Representatives? Happily for the nation this power is not without its constitutional boundaries, and is not above the law. When we examine the Constitution to ascertain in what cases the power of impeachment may be exercised—for what acts civil officers may be impeached—we are informed that—

"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." (Art. II, sec. 2.)

In these cases only can the power of impeachment be lawfully used. It would seem to be difficult to mistake the import of this plain provision of the fundamental law of the land; and yet it is not free from conflicting interpretations. This conflict does not arise upon the terms "treason" and "bribery," for they are too well understood and too clearly defined in the Constitution and the laws of the land to admit of any disputation concerning them. They are both crimes of a high grade and punishable upon indictment in the courts of the United States. They are offenses against the public weal, with just and adequate penalties prescribed for them by the law of the nation. There is no difficulty in ascertaining the meaning of the Constitution in so far as it relates to these crimes. Whatever conflict of opinion has arisen respecting the extent of the power of impeachment finds its origin in the terms "other high crimes and misdemeanors." These terms, it has been claimed, give a latitude to the power reaching far beyond the field of indictable offenses. This doctrine is denied. Here arises the only doubt concerning the jurisdiction of the impeaching power of the House of Representatives.

The fact that the framers of the Constitution selected by name two indictable crimes as 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

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official life, grave and unimportant, harmful and harmless, alike. It is unreasonable to say that the men who framed our Constitution, after undertaking to place a limitation on the power of impeachment, ended their effort by throwing away all restraints upon its exercise and placing it entirely within the keeping of those upon whom it was intended to confer only a limited power. There is something more stable than the whims, caprices, and passions of a majority established as a restraint upon this power by the Constitution. The House of Representatives may impeach a civil officer, but it must be done according to law. It must be for some offense known to the law and not created by the fancy of the Members of the House. As was very pertinently remarked by Hopkinson on the trial of Chase, "The power of impeachment is with the House of Representatives, but only for impeachable offenses. They are to proceed against the offense, but not to create the offense and make any act criminal and impeachable at their will and pleasure. What is an offense is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the legislature; and when the offense thus described by the Constitution or the law has been committed, then, and not till then, has the House of Representatives power to impeach the offender."

A civil officer may be impeached for a high crime. What is a crime? It is such a violation of some known law as will render the offender liable to be prosecuted and punished. "Though all willful violations of rights come under the generic name of wrongs, only certain of those made penal are called crimes." (Encyc. Brit. vol. xiii, 275.) The offense must be a violation of the law of the sovereignty which seeks to punish the offender; for no act is a crime in any sovereignty except such as is made so by its own law. In England no act is a crime save such as is so declared either by the written or unwritten law of the Kingdom, and therefore only crimes by the law of England are indictable in England. Crimes are defined and punished by law—by the law of the sovereignty against which the crime is committed—and nothing is a crime which is not thus defined and punished. "Municipal law" (which, among its multiplicity of offices, defines and punishes crimes) "is a rule of action prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." (1 Blackstone, 44.) Nothing is a crime which is not a breach of this command or prohibition as carries with it a prescribed penalty. Hence Blackstone said: "All laws should be, therefore, made to commence in futuro." The citizen must be notified of what acts are crimes, and he can not be lawfully punished for any others. The reasonableness of this rule was appreciated, and its enforcement provided for, by the convention which framed the Constitution of the United States, when they placed in that instrument the declaration that "no * * * ex post facto law shall be passed." No act which as not a crime at the time of its commission can be made so by subsequent legislative or judicial action; and this doctrine is as binding on the House of Representatives when exercising its powers of impeachment as when employed in ordinary criminal legislation.

All that has been said herein concerning the term "crimes" may be applied with equal force to the term "misdemeanors" as used in the Constitution. The latter term in no wise extends the jurisdiction of the House of Representatives beyond the range of indictable offenses. Indeed, the terms "crime" and "misdemeanor" are, in their general sense, synonymous, both being such violations of law as expose the persons committing them to some prescribed punishment; and, although it can not be claimed that all crimes are misdemeanors, it may be properly said that all misdemeanors are crimes.

In elaboration of its discussion of misdemeanors as crimes the minority views quote Blackstone's Commentaries and Hale's Pleas of the Crown, concluding:

Thus it appears that the terms "crime" and "misdemeanor" merely indicate the different degrees of offenses against law—crime marking the felonious degree, misdemeanor denoting "all offenses inferior to felony." Both indicate indictable offenses. They are terms of well-established legal signification. There is nothing uncertain about them. The framers of the Constitution used these terms as terms of art, and we have no authority for expounding them beyond their true technical limits.

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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 offirm, that in all things appertaining to the trial of the impeachment of —— ——, you will do impartial justice according to the Constitution and laws of the United States." (Chase's Trial, vol. 1, p. 12.) This oath is very comprehensive. It covers the charge, the evidence, and all the rules thereof; the decisions upon all questions arising during the progress of the trial, and the final judgment. In all these several respects the members of the court are to be guided by the Constitution and laws of the United States. They can try upon no charges other than treason, bribery, or other high crimes and misdemeanors; and the offense charged must be known to the Constitution, or to the laws of the United States. The rules of evidence under and in pursuance of which crimes may be proved upon indictment in the courts of the United States are to be observed. The judgment "shall not extend further than a removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." The office of the oath is to insure a strict observance of these requirements of the Constitution and the laws. This seems clear without further reference to other provisions of the Constitution; but it is proper that we should look at all of its clauses bearing upon the question under discussion.

The Constitution having created a court for the trial of impeachments, prescribed its jurisdiction and placed a limitation on its power to pronounce judgment, then declares that "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." It would seem difficult, indeed, to misunderstand this language. A civil officer convicted on impeachment is, notwithstanding such conviction, still liable to a prosecution for the same offense in the courts of ordinary criminal jurisdiction. How can this be if his offense be not an indictable crime? The court of impeachment can not apply the usual statutory punishment. It can not go beyond removal from, and disqualification to hold, office under the United States. The enforcement of other penalties for the same criminal conduct is left to the criminal courts of the country, after conviction upon indictment. Is not this substantially a constitutional direction to the court of impeachment not to convict a civil officer of any crime or misdemeanor for which an indictment will not lie? This view of the question was very forcibly stated by Mr. Martin, in his argument in Chase's case, in these words: "The very clause in the Constitution, of itself, shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offense, else the provision would have been not only nugatory but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offense, could prevent the same person from being indicted and punished for another and different offense." (Chase's Trial, vol. 2, p. 137.) How can the force of this argument be avoided? Wherein does it lack the support of sound reason and good sense? But it does not rest merely upon the clauses of the Constitution above quoted; others, yet to be noticed, give it much additional strength, and these will now be examined.

The section of the Constitution securing the trial by jury reads as follows: "The trial of all crimes, except in cases of impeachment, shall be by jury." (Sec. 2, art. 3.) Can it be successfully claimed that the word "crimes," as here used, is

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less comprehensive than it is where it occurs in section 4 of article 2? If not, then the crimes for which a civil officer may be impeached are the subjects of indictment or presentment; for such only can be tried by a jury. Any act which is a crime within the meaning of the last-named section is also a crime within the intent of the former, although the converse of this proposition is not true, as it is not every crime which a jury may try that will render a civil officer committing it liable to impeachment. For the latter purpose the crime must "have reference to public character and official duty." (Rawle on the Constitution, 204.) The plain inference to be drawn from the section is "that cases of impeachment are cases of trials for crimes."

Again, in that part of the Constitution which clothes the President with the power to grant pardons, it is said, "He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." (Art. 2, sec. 2.) What is the meaning of the term "offenses?" It can not mean less than such acts as render offenders liable to punishment, else why is a pardon necessary, or even desirable? No one needs a pardon who has not committed a crime. A pardon shields from or relieves of punishment. Punishment follows trial and conviction. Trial and conviction for crime can be had only for a violation of an existing law declaring the act done a crime. The term offenses, then, means crimes, in which, of course, is included misdemeanors. High crimes and misdemeanors are subject to two jurisdictions—first, in the ordinary criminal courts of the country; second, in the high court of impeachment. The same party, for the same acts, may be on trial in both tribunals at the same time. If convicted in both cases the President may pardon the criminal and relieve him of the consequences resulting from a conviction by the first-named jurisdiction, but the Constitution forbids his interference with the last. The grant of power and the exceptions are both in the same clause of the same section, and the fact that they are thus intimately associated shows that they relate to the same subjects—indictable offenses.

The views refer in this connection to a fact recorded in the Chase trial as significant:

Eight articles were preferred against him by the House of Representatives. It seems to have been admitted that all of the articles except the fifth charged him with criminal conduct. In regard to the fifth, his counsel made the point that it did not "charge in express terms some criminal intent on the respondent." The proof was as clear upon this point as it was upon the remaining seven. Thirty-four Senators voted on the several articles, and while the votes on seven of them ranged from 4 to 19 for conviction, every Senator answered "not guilty" on the fifth. It is fair to conclude, in view of the proof submitted in proof of the several articles, that the members of the court approved the position taken by the counsel of Chase on the trial.

The minority next examine the precedents, denying that either in this country or in England did they sustain the contention of the majority.

(*a*) As to precedents in this country.

The views discuss first the Blount case, saying of the charges that "they were undoubtedly regarded as indictable offenses;" but the court did not pass upon them, deciding that Blount was not a civil officer, and hence not within the jurisdiction of the court.

The Pickering case is next discussed, and after setting forth the charges the views take up the issue of insanity raised by Pickering's son, and say:

This issue was a grave and pertinent one, and yet the court, after deciding to entertain it, and proceeding to its trial, finally disposed of the case as though no such issue had been raised. This conduct of the court is both remarkable and discreditable; but not more so than its final action on the question of the guilt or innocence of the accused. Pickering was impeached for high crimes and misdemeanors. If convicted at all, the Constitution required that it should be for high crimes and misdemeanors, as there were no charges of treason or bribery in the case. In order that the guilt or innocence of the respondent should be directly passed upon by the court, without any improper evasion of its real and legal merits, Senator White moved that the "following question be put to each Member

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upon each article of impeachment, viz, Is John Pickering, district judge of the district of New Hampshire, guilty of high crimes and misdemeanors upon the charges contained in the ——— article of impeachment, or not guilty?" The mover stated that he had borrowed the form of the question from the one used in the case of Warren Hastings. The question was fair in form, and presented the identical issue which the court was about to decide; but it did not suit the purposes of those who were determined to convict, and it was rejected by a vote of yeas 10, nays 18. Thereupon Senator Anderson moved the following form, viz, "Is John Pickering, district judge of the district of New Hampshire, guilty as charged in the ——— article of the impeachment exhibited against him by the House of Representatives?" This form was adopted by yeas 18, nays 9. (Ibid., 364.) So the court, after entertaining the plea of insanity and neglecting to decide it, on the foregoing evasive and unmeaning question, convicted Pickering on each article, and removed him from office; but this end was reached by a strict party vote. Senator Dayton said of the form of the question and the reason of its adoption: "They were simply to be allowed to vote whether Judge Pickering was guilty as charged—that is, guilty of the facts charged in each article—aye or no. If voted guilty of the facts, the sentence was to follow, without any previous question whether those facts amounted to a high crime or misdemeanor. The latent reason of this course was too obvious. There were members who were disposed to give sentence of removal against this unhappy judge upon the ground of the facts alleged and proved who could not, however, conscientiously vote that they amounted to high crimes and misdemeanors, especially when committed by a man proved at the very time to be insane, and to have been so ever since, even to the present moment." (Ibid., 365.) If this rule is to be followed, any civil officer may be impeached, convicted, and removed from office for acts entirely proper and strictly lawful. Who can wonder that members of the court denounced the whole proceeding as "a mere mockery of trial?" Surely the case reflects no credit on the Senate which tried it, and in one short year the members of the body seem to have arrived at the same conclusion; for, on the trial of Judge Chase, the form of the question adopted to be propounded to each member of the court was as follows, viz, "Mr. ———, how say you; is the respondent, Samuel Chase, guilty or not guilty of a high crime or misdemeanor, as charged in the ——— article of impeachment?" (Ibid., 2d sess., 8th Con., 664.) It is to be hoped that no one will ever quote the Pickering case as an authority to guide the House in presenting, or the Senate in trying, a case of impeachment. It decided nothing except that party prejudice can secure the conviction of an officer impeached in spite of law and evidence.

The case against Judge Chase is next reviewed at length:

The next case carried to the Senate by the House of Representatives has gone into history as one "without sufficient foundation in fact or law." (Hildreth's History of the United States, Vol. V, 254.) The case of Samuel Chase, a judge of the Supreme Court of the United States, is now referred to. Chase was impeached for high crimes and misdemeanors in eight articles. It is not necessary to set out the substance of these articles. One of them was founded in his conduct at the trial of John Fries for treason, before the circuit court of the United States at Philadelphia, in April and May, 1800—more than four years before his impeachment. Five of them were based on his conduct at the trial of James Thompson Callender "for printing and publishing, against the form of the act of Congress, a false, scandalous, and malicious libel," etc., "against John Adams, then President of the United States," etc. The remaining two rested on his charge to the grand jury in and for the district of Maryland, in May, 1803, and his refusal to discharge the grand jury in and for the district of Delaware, in June, 1900. The articles portrayed the conduct of Judge Chase in as offensive a manner as the committee could commend. The bitterness of Randolph appeared in every article, and the enemies of the accused felt confident of his conviction.

Chase answered minutely and elaborately to the several articles, and filed against each the following plea, viz: "And the said Samuel Chase, for plea to the said article of impeachment, saith that he is not guilty of any high crime or misdemeanor, as in and by said first article is alleged; and this he prays may be inquired of by this honorable court in such manner as law and justice shall seem to them to require." (Ibid., 117.) This was the issue on which the case went to trial. The result was the acquittal of Chase on each article.

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This result was not owing to a failure of the evidence produced to support the facts alleged; for, so far as at least four of the articles are concerned, the allegations were supported in almost every particular; and had the same form of question been used on the conclusion of the trial as was adopted in the Pickering case, Chase doubtless would have been convicted. The questions propounded in both cases have already been quoted, and a mere glance at them will show how Pickering was convicted and Chase acquitted.

If this case establishes anything, it is that an impeachment can not be supported by any act which falls short of an indictable crime or misdemeanor. This point was urged by the able counsel for Chase with great ability and pertinacity; and the force with which it was presented drove the managers of the House of Representatives to seek shelter under that clause of the Constitution which says: "The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." (Manager Nicholson's speech, ibid., 597.) This provision, respecting the tenure of the judicial office, it was claimed, would authorize the impeachment of a judge for misbehavior which would not support an indictment. The court did not approve this position, and very properly, for as the Constitution provides that civil officers may be impeached for high crimes or misdemeanors, and nothing is known to the law as a high crime or misdemeanor which is not indictable, of course an impeachment for anything else would be improper.

If the position assumed by the managers in the Chase case, that a judge may be impeached for mere misbehavior in office not amounting to an indictable offense, because such conduct is a breach of the tenure by which the judicial office is held, is correct, what would be its effect on the case which this committee now have in hand? If resort must be had to the clause of the Constitution which prescribes the tenure of the judicial office to justify an impeachment of a judge on account of conduct not known to the law as a crime, does it not reach too far to serve the purposes of those who would impeach the President of the United States because of acts for which he may not be indicted? The President holds his office by a different tenure. The Constitution says: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years." (Art. 2, sec. 1.) This provision of the Constitution stands firmly in the way of those persons who would tone down the term misdemeanor below the indictable standard by resorting to the clause fixing the judicial tenure. Judges hold their respective offices during good behavior; the President holds for a definite time—four years. If, therefore, the argument proves anything in the former case, it proves too much for the latter. If a judge may be impeached for nonindictable conduct, because he holds his office during good behavior, it follows logically that an officer who holds for a term of years can not be so impeached. This exposes the fallacy of the entire argument.

The case of Judge Peck is commented on only so far as to record that the court sustained the respondent's contention that his conduct was proper, lawful, and right.

As to the case of Judge Humphries, the views say:

Humphries was convicted, as it was right he should be. He was charged with a crime against the known law of the land; he was a traitor against the Government of the United States.

(*b*) As to the English precedents.

At the outset of this branch of the inquiry, the minority say:

Cases can doubtless be found wherein Parliament has exercised this high power in a most extraordinary manner and convicted persons upon charges not indictable. The power of Parliament over the subject is far greater than that which the two Houses of Congress can exercise over the citizen. * * * In times of high party excitement this power has been in some cases most shamefully and oppressively exercised.

Then follows a review of some of these cases, concluding:

Individual resentment, partisan prejudice and excitement, and desire for revenge, instigated very many of the English impeachment cases. This is very well illustrated in the speech of Lord Carnarvon on the trial of the Earl of Danby—a speech that forms one of the footprints in the history of parliamentary impeach-

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ments which should ever remind the people of this nation that great caution should be used in the selection of English precedents. Carnarvon said: "My lords, I understand but little of Latin, but a good deal of English, and not a little of English history, from which I have learned the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I could bring many instances, and those ancient; but, my lords, I shall go no further than the latter end of Queen Elizabeth's reign, at which time the Earl of Essex was run down by Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Stafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Stafford, and your lordships know what became of Sir Harry Vane. Chancellor Hyde (Lord Clarendon) ran down Sir Harry Vane, and your lordships know what became of the chancellor. Sir Thomas Osborn, now Earl of Danby, ran down Chancellor Hyde; but what will come of the Earl of Danby your lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him." (11 Howell, S. T., 632, 633.)

Did chance weld the chain which so closely holds these names together in the history of parliamentary impeachment? Was it not rather the natural product of misused power? The officer or party who misuses power may be considered fortunate indeed if the wheel of fortune returns no retribution.

The minority then go on to discuss the "well-considered cases of parliamentary impeachments," those of the Earl of Macclesfield, Warren Hastings, and of Viscount Melville, and to deduce therefrom support for the view which they take. In their opinion these cases should be followed, and they say:

The idea that the House of Representatives may impeach a civil officer of the United States for any and every act for which a parliamentary precedent can be found is too preposterous to be seriously considered.

The minority views then take up the remaining branch of the question:

If only indictable crimes and misdemeanors are impeachable, by what law must they be ascertained? Must it be by the law of the United States, of the States, the common law, or by any or all of these?

In the case of the United States *v.* Hudson and Goodwin (7 Cranch, 32) it was held that "the legislative authority must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense" before the courts of the United States can exercise jurisdiction over it. This doctrine was affirmed by the case of the United States *v.* Coolidge et al. (1 Wheaton, 415), and Chief Justice Marshall, in delivering the opinion of the court in Ex parte Ballman and Swartwout (4 Cranch, 95), said: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law can not transcend that jurisdiction." And it was in following these cases that Justice McLean held, in the United States *v.* Lancaster (2 McLean's R., 433), that "the Federal Government has no jurisdiction of offenses at common law. Even in civil cases the Federal Government follows the rule of the common law as adopted by the States, respectively. It can exercise no criminal jurisdiction which is not given by statute, nor punish any act, criminally, except as the statute provides." The same doctrine is followed in 1 Wash. C. C. R., 84; 2 Brock, 90; 1 Wood and Minot, 401; 3 Howard, 103; 12 Peters, 654; 4 Dallas, 10, and note; 1 Kent's Com., 354; Sedgwick on Statutory and Constitutional Law, 17; and Wharton, in reviewing this question, says: "However this may be on the merits, the line of recent decisions puts it beyond doubt that the Federal courts will not take jurisdiction over any crimes which have not been placed directly under their control by act of Congress." (Am. Criminal Law, 174.)

Are these authorities founded in reason? If they are, why should they not be followed by the high court of impeachment, as well as other courts of the United States? The principle on which they proceed is that nothing is a crime against the United States which has not been declared so to be by the sovereignty of the

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Republic; that only the laws of the United States can be enforced in the courts of the United States; that the United States do what other civilized and Christian governments do—enforce their own laws, for such only are rules of conduct prescribed for their own citizens. This seems to be reasonable; and if it is so, it would be dicult to find an excuse, or form a pretext, for not applying it to the tribunal intrusted with the jurisdiction to try cases of impeachment.

But it is claimed that the high court of impeachment is exempt from this jurisdictional limitation by the terms of the Constitution itself; that the Constitution establishes the courts, confers its jurisdiction, and includes within it common-law crimes, inasmuch as it says: "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." This, it is said, opens the broad field of the common law for the ascertainment of offenses for the commission of which civil officers may be impeached; that the terms treason, bribery, and other high-crimes and misdemeanors are common-law terms, and are to be understood in the sense given them by the common law; that, as used in the Constitution, their import is the same as at common law. Is this true to the extent stated? Suppose the impeachment is to be for treason and some common-law treason is attempted to be set up, what would be the result? The Constitution says: "Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort." This puts an end to all attempts to impeach a civil officer of the United States for treason at common law. Then the term treason, as used in the Constitution, although it be a common-law term, is shorn of its common-law signification.

But it may be said that the term "bribery" is not defined in the Constitution, and therefore a civil officer may be impeached for bribery at common law. If this be true, why is it true? Bribery was, at the time the Constitution was formed, a crime known not only to the common law, but also to the laws of each of the thirteen States participating in the organization of the Government of the United States. It was selected by name because it affected the administration of the affairs of the Government in all of its departments—executive, legislative, and judicial—as treason touched the very life of the nation. Being thus selected by name, recourse may be had to the common law to ascertain the constituent elements of the crime thus named. "Courts may properly resort to the common law to aid in giving construction to words used in the Constitution" (3 Wheaton, 610; 1 Wood. and Minot, 448); and as the Constitution used the word bribery, resort can be had to the common law to determine its meaning. Thus, the framers of the Constitution placed within the jurisdiction of the high court of impeachment the two crimes which peculiarly affect the life and well-being of the nation—both being specifically named.

How it it with other offenses? The Constitution says: "or other high crimes and misdemeanors." What other high crimes and misdemeanors? To what extent can the common law aid us in answering this question? If we go to the common law to find what a crime is, we discover that it is some act or omission in violation of law which may be punished in the mode prescribed by law. This is the general significance of the term crime at common law. It is not a naming of a specific offense. If the Constitution had named murder, arson, burglary, larceny, or any other crime by its title the common law could have sided us in arriving at its meaning, for all these, and a multitude of others, are crimes at common law. After wandering over the entire field of common-law crimes, how are we to tell those which will support an impeachment? Learned writers assert that those offenses which may be committed by any person—such as murder, burglary, robbery, etc.—are not the subjects of impeachment. (Rawle on the Constitution, 204.) But these are all crimes, high crimes, and they meet us at every step in our gropings among the winding passages of the common law engaged in vain endeavors to determine what the Constitution means by the terms of high crimes and misdemeanors. Can any mode of escape from this perplexity be devised except that which shall affirm that the phrase "or other high crimes and misdemeanors" means such other high crimes and misdemeanors as may be declared by the lawmaking power of the United States? It is unreasonable to conclude that a civil officer can be impeached only for some crime or misdemeanor named by the Constitution or laws of the United States? This is the course pursued toward the citizen in private life. Why should greater uncertainty attend the public officer?

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It will not do to answer these suggestions by stating hypothetical cases and affirming that an officer who should do this, that, or another thing ought to be impeached, and that it would be unsafe for the nation to permit such conduct to pass unchallenged and unpunished. The obvious answer to all this is that everything which ought to be made a crime can be made so by legislation. The power is ample and the machinery perfect for all such work. If they are not used, the fault may not lie at the door of the delinquent officer. The statement of a supposed case of itself proves that a remedy may be provided. The remedy is to prohibit the doing of the thing supposed, and declaring its commission a crime. A case can not be stated which will not suggest its own remedy. Every difficulty may be surmounted by appropriate legislation; and the question may very well be asked, What right has the House of Representatives and the Senate of the United States to sleep on their undisputed legislative powers and then resort to the common law of England for the punishment of civil officers, when no civil court of the United States can punish a citizen or foreigner for any crime from the highest to the lowest degree, except it be first prescribed by an act of Congress? The decisions of the courts of the United States that they have jurisdiction of no crimes not found in the statutes of Congress give great force to the statement of Mr. Rawle in his work on the Constitution, that "The doctrine that there is no law of crimes except that founded in statutes, renders impeachment a nullity in all cases except the two expressly mentioned in the Constitution—treason and bribery—until Congress shall pass laws declaring what shall constitute the other high crimes and misdemeanors." (P. 265.)

Rawle combatted the doctrine of the decisions referred to, and this it is which gives peculiar force to the language just quoted from him; for he had accepted the doctrine of the decision in the case of the United States *v.* Hudson and Goodwin, it is perfectly evident that he would have declared the impeaching power inoperative, except so far as it relates to treason and bribery, until Congress, by legislation, should give it vitality.

Story also combatted this doctrine and denied the correctness of the decisions upon which it is based. It was this which gave direction to those parts of his Commentaries on the Constitution so freely quoted by those who claim that the power of impeachment is unlimited. He cites approvingly the works of Rawle above quoted. (Sec. 796.) He affirmed that the courts of the United States have jurisdiction of common-law crimes; but the decisions are against him. He states in his Commentaries on the Constitution that impeachments will lie for non-indictable offenses; but the authorities which he cites are against him. He cites Rawle; but it has already appeared how that author surrenders the entire position. He quotes 2 Woodeson, Lecture 40, but in this very lecture Woodeson says: "Impeachments, as we have seen, are founded and proceed upon the laws in being. A more extraordinary course is sometimes adopted. New and occasional laws have been passed for the punishment of offenders. Such ordinances are called bills of attainder and bills of pains and penalties." (2 Woodeson, 620.)

Offenses known to the laws in being are indictable; and the Congress of the United States may not resort to bills of attainder and bills of pains and penalties; these are forbidden by the Constitution. But to what laws must the offenses be known? To the law of the sovereignty against which they are alleged to have been committed.

Is there any foundation on which to rest a contrary doctrine? May not the case be stated as a syllogism thus: No officer is subject to the impeaching power for the commission of an act which is not indictable; common-law crimes are not indictable in the courts of the United States; ergo, common-law crimes will not sustain an impeachment by the House of Representatives of the United States?

The case of the United States *v.* Hudson and Goodwin was decided by the Supreme Court of the United States in February, 1812, and its doctrine has been adhered to from that day to the present time. It is of some importance to remember this date, as it is subsequent to the impeachment of Blount, Pickering, and Chase, which may account for the failure to raise the question in those cases: "Can a civil officer be impeached for an offense which is not indictable under the laws and in the courts of the United States?" It was not necessary to raise it in the Peck case, for his defense, as has already been stated, was a justification of his conduct, while the Humphreys case was founded on statutory offenses, and no defense was made.

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2407. The first attempt to impeach President Johnson, continued.

The first attempt to impeach President Johnson continued over a recess of the Congress.

In the first imquiry the House decided not to impeach President Johnson.

At the time of the impeachment of President Johnson it was conceded that he was entitled to exercise the duties of the office until convicted by the Senate.

Reference to argument of Senator Charles Sumner that President Johnson should be suspended during impeachment proceedings.

An instance where the power of obstruction by dilatory motions was used to compel a direct vote on an issue.

On December 6, 1867,[25] at the next session of Congress, the House took up for consideration the resolution proposed by the majority of the committee:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdeameanors.

The debate was confined to two speeches, one by Mr. Boutwell in favor of the resolution and one by Mr. Wilson against it.[26] While the speakers discussed both the law and the facts, Mr. Boutwell laid greatest stress on the law, as he conceded that—

if the theory of the law submitted by the minority of the committee be in the judgment of this House a true theory, then the majority have no case whatever.

It appears also that some question had been raised as to the effect of impeachment on the duties of the office of President, and Mr. Boutwell said:

After much deliberation I can not doubt the soundness of the opinion that the President, even when impeached by this House, is still entitled to his office until he has been convicted by the Senate.[27]

At the close of his speech, Mr. Wilson moved to lay the resolution on the table. As the effect of this motion was to prevent debate and also a direct vote on the issue, dilatory proceedings were begun by those favoring impeachment and continued until December 7, when Mr. Wilson withdrew his motion to lay on the table as a compromise step and thus conceded to the obstructors their demand for a direct vote.

On the question on the resolution, "Will the House agree thereto?" there appeared—yeas 57, nays 108.[28]

So the first attempt to impeach the President failed.

Although debate was not permitted generally when the resolution was under consideration, Members availed themselves of the freedom of debate in Committee of the Whole House on the state of the Union, and on December 13[29] the subject was discussed at length by several Members.

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

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

[27] Globe, appendix, p. 54. This view was sustained by the event. The House impeached President Johnson on February 24, 1868, and the trial ended May 26, 1868. During that time he continued in the ordinary performance of his duties, as is shown by his communications to the House. (See House Journal, pp. 515, 572, 655, second session Fortieth Congress.) On March 5, 1868 (second session Fortieth Congress, Globe, pp. 1676, 1677), Mr. Charles Sumner, of Massachusetts, in the Senate made an interesting and elaborate argument to show that it was the intention of the framers of the Constitution that the President should be suspended during impeachment proceedings.

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

[29] Globe, pp. 172–193.

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The Impeachment and Trial of the President*

1. Acts setting proceedings in motion. Section 2408.
2. Preliminary investigation ex parte. Section 2409.
3. Initial discussion as to impeachable offenses. Sections 2410–2411.
4. Impeachment voted and articles authorized. Section 2412.
5. Presentation of the impeachment at the bar of the Senate. Section 2413.
6. Rules for the trial. Section 2414.
7. Articles considered and adopted. Sections 2415, 2416.
8. Choice of managers by the House. Section 2417.
9. Report of additional articles by managers. Sections 2418, 2419.
10. Articles presented in the Senate. Section 2420.
11. Introduction of the Chief Justice. Sections 2421, 2422.
12. House demands process and summons ordered. Section 2423.
13. Return of the summons and calling of respondent. Section 2424.
14. Allowance of time for respondent's answer. Section 2425.
15. As to delay in beginning trial. Section 2426.
16. House determines to attend trial. Section 2427.
17. The respondent's answer. Sections 2428–2429.
18. Time given respondent to prepare for trial. Section 2430.
19. House prepares and presents replication. Sections 2431, 2432.
20. The opening arguments and trial. Section 2433.
21. Order of final arguments. Section 2434.
22. Deliberation and decision by the Senate. Sections 2435–2443.

2408. The impeachment and trial of Andrew Johnson, President of the United States.

The impeachment of President Johnson was set in motion by a resolution authorizing a general investigation as to the execution of the laws.

The House referred to the Committee on Reconstruction the evidence taken by the Judiciary Committee in the first attempt to impeach President Johnson.

A proposition to impeach President Johnson was held to be privileged, although at this session a similar resolution had been considered and negatived.

Secretary Stanton communicated directly to the House the fact of the President's attempt to remove him.

The first attempt to impeach Andrew Johnson, President of the United States, failed on December 7, 1867.[1] Thereafter the subject was debated at length on December 13 [2] in the Committee of the Whole House on the state of the Union, but not with any proposition for action pending, and rather with reference to the questions of law and fact raised in the preceding discussions.

*Hinds' Precedents, vol. 3, p. 844 (1907).
[1] Second session Fortieth Congress, Journal, p. 53; Globe, p. 68.
[2] Globe, pp. 172–193.

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On January 22, 1868,[3] Mr. Rufus P. Spalding, of Ohio, moved that the rules be suspended in order that he might present the following resolution:

Resolved, That the Committee on Reconstruction be authorized to inquire what combinations have been made or attempted to be made to obstruct the due execution of the laws, and to that end the committee have power to send for persons and papers and to examine witnesses on oath, and report to this House what action, if any, they may deem necessary, and that said committee have leave to report at any time.

The motion was agreed to, yeas 103, nays 37; and the resolution being before the House, motions to lay it on the table, to fix the day to which the House should stand adjourned, and to adjourn were successively disagreed to. Then, under operation of the previous question, the resolution was agreed to, yeas 99, nays 31.

On February 10[4] Mr. Thaddeus Stevens, of Pennsylvania, by unanimous consent, submitted the following resolution; which was agreed to by the House:

Resolved, That the evidence taken on impeachment by the Committee on the Judiciary,[5] be referred to the Committee on Reconstruction, and that the committee have leave to report at any time.

On February 21[6] the Speaker laid before the House the following communication:

WAR DEPARTMENT,
Washington City, February 21, 1868.

SIR: General Thomas has just delivered to me a copy of the inclosed order, which you will please communicate to the House of Representatives.

E. M. STANTON, *Secretary of War.*

EXECUTIVE MANSION,
Washington, D.C., February 21, 1868.

To Hon. Edwin M. Stanton, Washington, D.C.

Hon. SCHUYLER COLFAX,
Speaker House of Representatives.

SIR: By virtue of the power and authority vested in me, as President, by the Constitution and laws of the United States, you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon the receipt of this communication.

You will transfer to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

Respectfully yours,

ANDREW JOHNSON.

Mr. Elihu B. Washburne, of Illinois, moved that the communication be referred to the Committee on Reconstruction. This motion was agreed to without division, although there were suggestions that the letter should go to the Judiciary Committee or to a select committee.

On the same day, and thereafter,[7] Mr. John Covode, of Pennsylvania, rising to a question of privilege, presented this resolution:

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors.

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[3] Journal, pp. 259–262; Globe, pp. 784, 785.
[4] Journal, p. 330; Globe, p. 1087.
[5] It was on this evidence that the first attempt to impeach had been made.
[6] Journal, p. 382; Globe, pp. 1326, 1327.
[7] Journal, p. 385; Globe, pp. 1329, 1330.

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Mr. Fernando Wood, of New York, having objected, the Speaker[8] said:

It is a privileged question.

Then, on motion of Mr. George S. Boutwell, of Massachusetts, the resolution was referred to the Committee on Reconstruction.

2409. President Johnson's impeachment, continued.

The second and successful proposition to impeach President Johnson was reported from the Committee on Reconstruction.

The second investigation of the conduct of President Johnson was ex parte.

The full report justifying the proposition to impeach President Johnson.

On February 22[9] Mr. Thaddeus Stevens, of Pennsylvania, presented from the Committee on Reconstruction the following report:

That in addition to the papers referred to the committee, the committee find that the President, on the 21st day of February, 1868, signed and issued a commission or letter of authority to one Lorenzo Thomas, directing and authorizing said Thomas to act as Secretary of War ad interim, and to take possession of the books, records, and papers, and other public property in the War Department, of which the following is a copy:

EXECUTIVE MANSION,
Washington, February 21, 1868.

SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office. Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Maj. Gen. Lorenzo Thomas,
Adjutant-General of the United States Army; Washington, D.C.
Official copy respectfully furnished to Hon. Edwin M. Stanton.

L. THOMAS,
Secretary of War ad interim.

Upon the evidence collected by the committee, which is herewith presented, and in virtue of the powers with which they have been invested by the House, they are of the opinion that Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors. They therefore recommend to the House the adoption of the accompanying resolution.

Resolved, That Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office.

This report was signed by Messrs. Stevens, George S. Boutwell, of Massachusetts, John A. Bingham, of Ohio, C. T. Hulburd, of New York, John F. Farnsworth, of Illinois, F. C. Beaman, of Michigan, and H. E. Paine, of Wisconsin. There were no minority views, Mr. James Brooks, of New York, who dissented, stating that he had not had the time to prepare them. Mr. James B. Beck, of Kentucky, also a member of the committee, dissented.

2410. President Johonson's impeachment, continued.

The committee reporting the second proposition to impeach President Johnson disagreed as to the grounds thereof.

The question whether impeachment must be confined to indictable offenses was in issue as to the second report favoring impeachment of President Johnson.

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[8] Schuyler Colfax, of Indiana, Speaker.
[9] Journal, p. 390; Globe, p. 1336.

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Argument of Mr. Thaddeus Stevens that impeachment is a purely political proceeding.

The resolution was debated at length on February 22 and 24.[10] It appears from this debate that the specific act most relied upon by the committee was violation of the law known as the tenure-of-office act,[11] and which provided in its first section:

> That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any office, and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided*, That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney General shall hold their offices respectively for and during the term of the President by whom they have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

And in its sixth section:

> That every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed and are hereby declared to be high misdemeanors, and upon trial and conviction thereof every person guilty thereof shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court.

It was urged generally that the removal of Mr. Stanton and the appointment of General Thomas ad interim constituted specific violations of this law. Members of the House who had by their votes assisted in defeating the first attempt at impeachment, supported the pending resolution on the ground that it was based on an offense indictable under Federal law. Thus, Mr. James F. Wilson, of Iowa, who had submitted the minority views on which the defeat of the former attempt was based, said [12] in this case:

> The considerations which weighed upon my mind and molded my conduct in the case with which the Committee on the Judiciary of this House was charged are not to be found in the present case. The logic of the former case is made plain, not to say perfect, by its sequence in the present one. The President was working to an end suspected by others, known to himself. His then means were not known to the law as crimes or misdemeanors, either at common law or by statute, and we so pronounced. He mistook our judgment for cowardice, and worked on until he has presented to us, as a sequence, a high misdemeanor known to the law and defined by statute.

Others who had voted against impeachment in the former instance expressed similar views. Mr. Thaddeus Stevens, of Pennsylvania, in closing the debate,[13] indicated, however, that he did not consider the case as narrowed to this point alone:

> The charges, so far as I shall discuss them, are few and distinct. Andrew Johnson is charged with attempting to usurp the powers of other branches of the Government; with attempting to obstruct and resist the execution of the law; with misprision of bribery; and with the open violation of laws which declare his acts misdemeanors and subject him to fine and imprisonment; and with removing from office the Secretary of War during the session of the Senate without the advice or consent of the Senate; and with violating the sixth section of the act entitled "An act regulating the tenure of certain civil offices." There are other offenses charged in the papers referred to the committee which I may consider more by themselves.

[10] Globe, pp. 1336, 1360, 1382, 1393.
[11] Act of March 2, 1867, 14 Stat. L., p. 430.
[12] Globe, pp. 1386, 1387.
[13] Globe, p. 1399.

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In order to sustain impeachment under our Constitution I do not hold that it is necessary to prove a crime as an indictable offense, or any act malum in se. I agree with the distinguished gentleman from Pennsylvania, on the other side of the House, who holds this to be a purely political proceeding. It is intended as a remedy for malfeasance in office and to prevent the continuance thereof. Beyond that, it is not intended as a personal punishment for past offenses or for future example.

Impeachment under our Constitution is very different from impeachment under the English law. The framers of our Constitution did not rely for safety upon the avenging dagger of a Brutus, but provided peaceful remedies which should prevent that necessity. England had two systems of jurisprudence—one for the trial and punishment of common offenders, and one for the trial of men in higher stations, whom it was found difficult to convict before the ordinary tribunals. This latter proceeding was by impeachment or by bills of attainder, generally practiced to punish official malefactors, but the system soon degenerated into political and personal persecution, and men were tried, condemned, and executed by this court from malignant motives. Such was the condition of the English laws when our Constitution was framed, and the convention determined to provide against the abuse of that high power, so that revenge and punishment should not be inflicted upon political or personal enemies. Here the whole punishment was made to consist in removal from office, and bills of attainder were wholly prohibited. We are to treat this question, then, as wholly political, in which, if an officer of the Government abuse his trust or attempt to pervert it to improper purposes, whatever might be his motives, he becomes subject to impeachment and removal from office. The offense being indictable does not prevent impeachment, but is not necessary to sustain it. (See Story's Commentaries, Curtis on the Constitution, Madison, and others.) Such is the opinion of our elementary writers, nor can any case of impeachment tried in this country be found where any attempt was made to prove the offense criminal and indictable.

2411. President Johnson's impeachment, continued.

Discussion as to whether President Johnson was justified in attempting to test the constitutionality of the tenure-of-office law.

It was urged against the proposed resolution that the tenure-of-office act was unconstitutional, and therefore that the President had committed no specific violation of law. This view was set forth [14] most forcibly by Mr. James B. Beck, of Kentucky, a member of the Committee on Reconstruction:

All questions growing out of the combinations and conspiracies lately charged upon the President were ruled by the Reconstruction Committee to be insufficient and were not brought before this House. And the sole question now before us is, Is there anything in this last act of the President removing Mr. Stanton and appointing Adjutant-General Thomas Secretary of War ad interim to justify his impeachment by this House?

I maintain that the President of the United States is in duty bound to test the legality of every law which he thinks interferes with his rights and powers as the Chief Magistrate of this nation. Whenever he has powers conferred upon him by the Constitution of the United States, and an act of Congress undertakes to deprive him of those powers or any of them, he would be false to his trust as the Chief Executive of this nation, false to the interests of the people whom he represents, if he did not by every means in his power seek to test the constitutionality of that law, and to take whatever steps were necessary and proper to have it tested by the highest tribunal in the land, and to ascertain whether he has a right under the Constitution to do what he claims the right to do, or whether Congress has the right to deprive him of the powers which he claims have been vested in him by the Constitution of the United States, and that is all that he proposes to do in this case.

Now, if that is the object, and the only object, of the President, as I contend the facts show, then I can hardly bring myself to believe that any set of sane men can seriously entertain the opinion that in anything the President has done in the

[14] Globe, pp. 1349–1351.

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removal of Mr. Stanton he has been guilty of either a high crime or misdemeanor. But "whom the gods wish to destroy they first make mad," and if ever a party was stricken with judicial madness and blindness the action of this party now proves that they are the victims of it.

That the President should be considered guilty of a high crime or misdemeanor for desiring and attempting to bring to the test of judicial decision one of the powers with which he considers that the Constitution has clothed him, and of which power an act of Congress has attempted to divest him, and that, too, in regard to an officer who agrees with him in regard to that constitutional power, seems to me an idea too preposterous to be entertained outside of a lunatic asylum.

The humblest citizen has the undoubted right to try judicially his constitutional rights. In regard to an officer whose office is created by the Constitution it is not only the right but the official duty of the President to bring to the test of judicial decision every power of which Congress endeavors to deprive him and which he believes is vested in him by the Constitution. He can not obey the Constitution nor faithfully fulfill his oath of office without vindicating in a legal, orderly, and judicial mode those powers. A void act of Congress is no excuse before a court or even before the bar of enlightened public opinion for a failure to attempt in a constitutional, legal, and orderly manner to fulfill his constitutional duties. If, therefore, the President is guilty of a crime, that crime consists in his believing that the tenure-of-office bill is unconstitutional or that it does not apply to the case of Mr. Stanton; for if he does so believe it is a duty he can not, without violating his oath, decline to bring to the test of judicial decision whenever the duties of his office require him to remove an officer under his constitutional authority.

Mr. Beck then quoted Madison, Story, and Kent, and cited the attitude of Mr. Stanton himself, at the time the President declined to approve the tenure-of-office act, to show that by the Constitution the right to remove executive officers was vested solely in the President, and that he could not be deprived of this power by an act of Congress.

In opposition to this view it was urged,[15] in the first place, that on the day before this report was made in the House the Senate had solemnly passed on the question of prerogative by agreeing to the following:

Whereas the Senate have read and considered the communication of the President, stating that he had removed Edwin M. Stanton, Secretary of War, and had designated the Adjutant-General of the Army to act as Secretary of War ad interim: Therefore,

Resolved by the Senate of the United States, That under the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that officer ad interim.

Further, it was urged:[16]

The Constitution does not make him a judge of the law, but an executor thereof, and he is bound to execute that which the law-making power decrees to be the law of the land. Whatever may be his opinion of the law as a mere individual member of the national family, he is bound to yield it to that higher duty which the Constitution imposes on him as an officer of the state. If his conscience forbid, he may resign the trust, but he has no right to retain the power of a public officer and subordinate that to the judgment of a mere individual member of the community or nation which has clothed him with executive power for the enforcement of its laws. As an individual he may be justified in an assumption of the risks attendant upon a disobedience of the law; as a public officer no such plea can be properly entered in his behalf, for he is not only sworn to execute the law, but he also possesses the right of resignation. If his conscience will not permit him to execute a given law, he may resign his trust, and leave to his successor the performance of a duty which his judgment, as an individual, will not surrender to his obligations as a public officer. A willingness to submit to the penalty prescribed for the violation of a law may, to some extent, excuse disobedience on the part of a private citizen, and at the same time avail nothing to the public officer. The latter may at any time, by resignation, become a private citizen, but the former can not become a public

[15] Globe, p. 1341.
[16] By Mr. James F. Wilson, of Iowa, Globe, p. 1387.

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officer in this country except by the suffrages of his fellow-citizens. If he accepts the result of their suffrages, he merges his individuality into that official creature which binds itself by an oath as an executive officer to do that which, as a mere individual, he may not believe to be just, right, or constitutional. Such an acceptance removes him from the sphere of the right of private judgment to the plane of the public officer, and binds him to observe the law, his judgment as an individual to the contrary notwithstanding.

The Constitution invests the President with executive power in order that he may "take care that the laws be faithfully executed." Every abuse of this power, whether it be by an improper exercise of it or by neglect or refusal to exercise it at all, is a breach of official duty. But it is not every breach of official duty that can be charged as a crime or misdemeanor against the delinquent officer. Whatever doubt may have arisen in other cases of the criminal character of the official conduct involved in them, the one we are now considering presents no basis on which to rest a doubt. Deliberately, not to say defiantly, the President has violated a penal statute of the United States, and has thereby committed a high misdemeanor which the law says "shall be punished by a fine not exceeding $10,000, or by imprisonment not exceeding five years, or both said punishments, in the discretion of the court." (Act of March 2, 1847, sec. 6.) All of the circumstances attendant upon this case show that the President's action was deliberate and willful. * * *

Mr. Speaker, it has been urged in this debate that the President's sole object is to secure a judgment of the courts as to the constitutionality of the act regulating the tenure of certain civil offices. Such an intent will not justify the commission of a high crime or misdemeanor. Suppose the courts should hold the act to be constitutional, would the fact that his intent was to have that question decided be a good plea to an indictment for a violation of its provisions? Who is so insane as to assert so preposterous a proposition? Whoever acts in the way and for the purpose suggested does it at his peril. The work belongs to the President in this case, not to the law. This plea in his defense demonstrates that his action was not the result of inadvertence or of mistaken judgment, and that it is the fruit of cool calculation and deliberate purpose. He committed a high misdemeanor in order to secure a judgment of the court.

2412. President Johnson's impeachment, continued.

On the report from the Committee on Reconstruction the House voted the impeachment of President Johnson.

Forms of resolutions directing the carrying of the impeachment of President Johnson to the Senate.

The House authorized a committee of seven to prepare articles impeaching President Johnson, with power to compel testimony.

The impeachment of President Johnson was carried to the Senate by a committee of two.

The Speaker appointed the committee to carry the impeachment of President Johnson to the Senate from those favoring impeachment and from the majority party.

The Speaker appointed the committee to draw articles impeaching President Johnson from those favoring impeachment and from the majority party.

After full debate, on February 24,[17] the question was taken on the resolution proposed by the committee, "Will the House agree thereto?" and there appeared yeas 128, nays 47.

So the House determined upon the impeachment of the President.

Immediately thereafter Mr. Thaddeus Stevens proposed the following:

Resolved, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House

[17] Journal, p. 392; Globe, p. 1400.
[18] Journal, pp. 393, 396; Globe, pp. 1400–1402.
[19] Senate Journal, p. 217; Globe, p. 1403.

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of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of the said Andrew Johnson to answer to said impeachment.

2. *Resolved*, That a committee of seven be appointed to prepare and report articles of impeachment against Andrew Johnson, President of the United States, with power to send for persons, papers, and records, and to take testimony under oath.

After an attempted obstruction had been prevented by the adoption, under suspension of the rules, of an order preventing dilatory motions, the House agreed to the resolutions by a vote of yeas 124, nays 42.[18]

The Speaker announced as the committee under the first resolution Messrs. Thaddeus Stevens, of Pennsylvania, and John A. Bingham, of Ohio. Both were members of the Committee on Reconstruction and had signed the report, and both belonged to the majority party in the House.

As the committee under the second resolution the Speaker announced Messrs. George S. Boutwell, of Massachusetts, Thaddeus Stevens, of Pennsylavnia, John A. Bingham, of Ohio, James F. Wilson, of Iowa, John A. Logan, of Illinois, George W. Julian, of Indiana, and Hamilton Ward, of New York. All of these belonged to the majority party in the House and had voted for the impeachment. The first three were members of the Committee on Reconstruction.

2413. President Johnson's impeachment, continued.

The ceremonies of presenting the impeachment of President Johnson at the bar of the Senate.

A message was sent to inform the Senate that a committee would present the impeachment of President Johnson.

Form of declaration by the Chairman of the House committee in presenting the impeachment of President Johnson in the Senate.

The message of the House impeaching President Johnson was referred to a committee of seven Senators appointed by the Chair.

The Senate received the message impeaching President Johnson in its legislative capacity and not as a court.

The committee having impeached President Johnson, returned to the House and reported orally in the usual form.

On February 25,[19] in the Senate, the Clerk of the House delivered a message in form as follows:

Mr. President, I have been directed to inform the Senate that the House of Representatives has passed the following resolution:

"*Resolved*, That a committee of two be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Andrew Johnson to answer to said impeachment."

And that the House has appointed Mr. Thaddeus Stevens and Mr. John A. Bingham such committee.

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Soon thereafter[20] the Sergeant-at-Arms announced a committee from the House of Representatives, Mr. Thaddeus Stevens and Mr. John A. Bingham, who appeared at the bar of the Senate, when the following occurred:

Mr. STEVENS. Mr. President——

The PRESIDENT pro tempore.[21] The committee from the House of Representatives.

Mr. STEVENS. Mr. President, in obedience to the order of the House of Representatives, we appear before you, and in the name of the House of Representatives and of all the people of the United States we do impeach Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and we further inform the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and in their name we demand that the Senate take order for the appearance of the said Andrew Johnson to answer said impeachment.

The PRESIDENT pro tempore. The Senate will take order in the premises.

The committee of the House thereupon withdrew.

Thereupon Mr. Jacob M. Howard, of Michigan, proposed a resolution as follows:

Resolved, That the message of the House of Representatives relating to the impeachment of Andrew Johnson, President of the United States, be referred to a select committee of seven, to consider and report thereon.

Mr. James A. Bayard, of Delaware, objected that the Senate in its legislative capacity might not act on a question of impeachment, and that it should form itself into a court of impeachment before adopting the resolution. In answer to this it was stated that this was a mere preliminary proceeding, and that the procedure followed the precedent of the trial of Judge Peck.

After the resolution had been amended, on the suggestion of Mr. Roscoe Conkling, of New York, and in accordance with the precedent in the trial of Judge Humphreys, by adding after the word "seven" the words "to be appointed by the Chair," the resolution was agreed to.

The President pro tempore thereupon appointed Messrs. Howard, Lyman Trumbull, of Illinois, Roscoe Conkling, of New York, George F. Edmunds, of Vermont, Oliver P. Morton, of Indiana, Stephen C. Pomeroy, of Kansas, and Reverdy Johnson, of Maryland.

On the same day[22] the committee from the House, having returned from the Senate, reported orally at the bar of the House through Mr. Stevens, the chairman, as follows:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and in the name of this body and of all the people of the United States we impeached, as we were directed to do, Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and we demanded that the Senate should take order to make him appear before that body to answer for the same, and announced that the House would soon present articles of impeachment and make them good; to which the response was, "Order shall be taken."

2414. President Johnson's impeachment, continued.

To prevent dilatory tactics the House adopted, under suspension of the rules, a special order for consideration of the articles impeaching President Johnson.

Form of resolution in which the Senate took order for the impeachment of President Johnson.

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[20] Journal of Senate, p. 217; Globe, pp. 1405, 1406.
[21] Benjamin F. Wade, of Ohio, President pro tempore.
[22] House Journal, p. 405; Globe, p. 1421.

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For the trial of President Johnson the Senate readopted most of the existing rules, with amendments and additions.

On February 25,[23] in the House, Mr. Elihu B. Washburne, of Illinois, offered, under suspension of the rules, the following:

Resolved, That the rules be suspended, and that it is hereby ordered as follows: "When the committee to prepare articles of impeachment of the President of the United States report the said articles the House shall immediately resolve itself into the Committee of the Whole thereon that speeches in committee shall be limited to fifteen minutes each, which debate shall continue till the next legislative day after the report, to the exclusion of all other business except the reading of the Journal; that at 3 o'clock on the afternoon of said second day the fifteen-minute debate shall cease, and the committee shall then proceed to consider and vote upon amendments that may be offered under the five-minute rule of debate, but no merely pro forma amendment shall be entertained; that at 4 o'clock on the afternoon of said second day the committee shall rise and report their action to the House, which shall immediately and without dilatory motions vote thereon: that if the articles of impeachment are agreed on the House shall then immediately and without dilatory motions elect by ballot seven managers to conduct said impeachment on the part of the House; and that during the pendency of resolutions in the House relative to said impeachment thereafter no dilatory motions shall be received except one motion on each day that the House do now adjourn."

This resolution, which was intended to prevent obstructive action on the part of the minority, was agreed to, yeas 106, nays 37.

On the same day,[24] by a vote of yeas 105, nays 36, the House agreed to the following, on motion of Mr. George S. Boutwell, of Massachusetts:

Resolved, That the committee appointed to prepare and report articles of impeachment against Andrew Johnson, President of the United States, have leave to sit during the sessions of the House.

Resolved further, That the Committee on Reconstruction be authorized to sit during the sessions of the House.

On February 26,[25] in the Senate, Mr. Howard, from the select committee, reported the following resolution; which was agreed to, and of which the House was duly notified:

Whereas the House of Representatives, on the 25th day of the present month, by two of their members, Messrs. Thaddeus Stevens and John A. Bingham, at the bar of the Senate, impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and likewise demanded that the Senate take order for the appearance of said Andrew Johnson to answer to the said impeachment: Therefore,

Resolved, That the Senate will take proper order thereon, of which due notice shall be given to the House of Representatives.

On February 28,[26] in the Senate, Mr. Howard, from the select committee, presented a report "prescribing certain rules of proceeding for the Senate when sitting as a high court of impeachment." The rules comprised the rules of the Chase trial, with some modifications in minor details, and also several new rules. The Senate considered the report on February 29 and March 2,[27] and after amending the rules agreed to them.

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[23] Journal, pp. 407, 408; Globe, pp. 1425, 1426.
[24] Journal, p. 410; Globe, p. 1427.
[25] Senate Journal, p. 222; House Journal, p. 418; Globe, pp. 1431, 1453.
[26] Senate Journal, pp. 230, 231; Globe, pp. 1486, 1515; Senate Report No. 59.
[27] Senate Journal, pp. 236–252; Globe, pp. 1515–1585, 1568–1603.

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2415. President Johnson's impeachment, continued.

The articles impeaching President Johnson were considered in Committee of the Whole.

At the time of President Johnson's impeachment it was agreed that he should be described as President and not as Acting President.

On February 29,[28] in the House, Mr. George S. Boutwell, of Massachusetts, from the committee appointed to prepare articles of impeachment, submitted their report, which was at once considered in Committee of the Whole in accordance with the special order. At the outset Mr. Boutwell said:[29]

In considering and preparing these articles the committee met with a difficulty in the outset which it becomes me to present to the Committee of the Whole House in the beginning of this discussion. That difficulty is this: What should be the description, so far as the office is concerned, in which Andrew Johnson should be arraigned for these misdemeanors; whether as President of the United States or as Vice-President of the United States upon whom the powers and duties of the office of President had devolved.

After such consideration as the committee were able to give to this matter during the period of time assigned to the consideration of this subject they are, I believe I may say, unanimously of opinion that the manner of description used in the articles we have reported is that manner of description on which we shall be compelled to rely. Without undertaking at this moment to advise the House finally as to what they ought to do upon this branch of the subject, I will venture to suggest this consideration, derived from the Constitution: That it is only when the President is on trial before the Senate that the Chief Justice of the Supreme Court of the United States is to preside. Therefore it follows that a different court must be organized for the trial of the Vice-President from that authorized by the Constitution to try the President.

Later, on March 2,[30] Mr. John A. Bingham, of Ohio, said:

I desire to say, Mr. Chairman, to the House this question was considered by the committee, and I was not aware when the report was made there was a member of that committee who entertained the slightest doubt on the subject that Andrew Johnson is President of the United States. I desire to say that he must be impeached, if he be impeached at all, either distinctively as President of the United States or as Vice-President of the United States. I desire to say, further, that in both capacities he can not be impeached at the same time and on the same trial, for the reason that the court, as was well said by the chairman of the committee, is differently constituted by the terms of the Constitution to try the President of the United States. The Chief Justice of the United States must, by the terms of the Constitution, preside if the President be tried; the Chief Justice shall not preside if the Vice-President be tried.

Again, Andrew Johnson is estopped by record in five hundred instances from denying that he is President of the United States. The Senate of the United States is estopped; the House of Representatives is estopped. Your Constitution declares that no bill shall be a law until it be presented to the President for his approval or disapproval. If he be not President, if the people have no President, then you can pass no law. If he be President, then let him be called President on your record.

Mr. Luke P. Poland, of Vermont, said:

We have had some Congressional history to which I call the attention of the House. In all that has been said upon the subject I have heard no allusion to the settlement of this question in Congress. The first instance of the accession of Vice-President to the office of President was that of John Tyler on the death of President Harrison, in 1841. Before the first message of Mr. Tyler was

[28] House Journal, pp. 433, 437; Globe, pp. 1542–1558.
[29] Globe, p. 1544.
[30] Globe, p. 1615.

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sent in at the special session, as it was called, in 1841 the following proceedings took place in the House:

"Mr. Wise offered the usual resolution for the appointment of a committee on the part of the House to join such committee as might be appointed by the Senate to wait on the President of the United States and inform him that a quorum of the two Houses had assembled, and that Congress was ready to proceed to business.

"Mr. McKeon moved to amend the resolution by striking out the word 'President' and inserting the words 'Vice-President, now exercising the office of President.'"

After considerable debate the vote was taken in the House, and the amendment was rejected. The yeas and nays do not seem to have been taken.

When the message was sent to the Senate the same question was raised there. A similar amendment was offered to a similar resolution. There was more debate than in the House, participated in by Mr. Huntington, Mr. Allen, Mr. Tappan, Mr. Walker, and Mr. Calhoun. The yeas and nays were taken on this amendment in the Senate, and were as follows:

"Yeas—Messrs. Allen, Benton, Henderson, Linn, McRoberts, Tappan, Williams, and Wright—8.

"Nays—Messrs. Archer, Barrow, Bates, Bayard, Berrien, Buchanan, Calhoun, Choate, Clay of Kentucky, Clayton, Dixon Evans, Fulton, Graham, Huntington, Kerr, King, Mangum, Merrick, Miller, Moorehead, Nicholson, Pierce, Porter, Prentiss, Preston, Rives, Sevier, Simmons, Smith of Indiana, Southard, Sturgeon, Tallmadge, Walker, White, Woodbridge, Woodbury, and Young—38."

So that the question seems to have been settled by a vote of both Houses at that time, and during the whole administration, nearly four years of President Tyler and three years of President Fillmore, and now almost three years of President Johnson, this question has been regarded as settled by the decision of Congress in 1841.

As appears in the articles of impeachment, this reasoning was conclusive.

2416. President Johnson's impeachment, continued.

As reported from the committee, the articles impeaching President Johnson were confined to a few acts chiefly concerning Secretary Stanton.

Although the charges in the articles impeaching President Johnson were at first narrowed to a few charges, there was a protest against the theory that only an indictable offense was impeachable.

A statement as to the sentiments of the House on the nature of the power of impeachment during the first and second attempts to impeach President Johnson.

In the case of the Johnson impeachment, the question "Will the House agree thereto?" was put as to each article after they had been open to amendment.

The first or headline paragraph and the last or reservation clause were agreed to after the articles impeaching the President had been agreed to.

Mr. Boutwell stated that in the articles as reported the committee had confined themselves to the matters brought forward in the present proceedings, and had not gone into that broad field of general charges on which the first attempt at impeachment had failed. In the course of the debate, however, Mr. William Lawrence, of Ohio, argued again that the President might be impeached for other than indictable offenses, and said in the course of his remarks: [31]

I have taken some pains to ascertain the opinions of members of this House, and I think there are but few, even among those who voted against the impeach-

[31] Globe, pp. 1549, 1550.

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ment of the President in December last, who entertain the idea or now hold that he must be guilty of an offense indictable either by the common or statute law to render him liable to impeachment. Such a doctrine is at variance with the whole theory and practice in cases of impeachment.

On March 2 [32] the articles were discussed at length, amended somewhat, and agreed to. In the Committee of the Whole a committee amendment in the nature of a substitute was agreed to. When the articles were reported to the House this substitute was agreed to, and then, on each article, beginning with Article 1, the question was put: "Will the House agree thereto?" And on the nine articles the result was:

	Yeas	Nays
Article 1	127	42
Article 2	124	41
Article 3	124	40
Article 4	117	40
Article 5	127	42
Article 6	127	42
Article 7	127	42
Article 8	127	42
Article 9	108	41

Then, by unanimous consent, the first and last paragraphs were agreed to, as follows: [33]

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

* * * * * * *

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

2417. President Johnson's impeachment, continued.

The managers of the Johnson impeachment were chosen by ballot.

The Speaker appointed four tellers to count the ballots for managers of the Johnson impeachment.

Mr. Speaker Colfax tendered to several members of the minority a place as one of the tellers to count the ballots for managers of the Johnson impeachment.

Members of the minority declining to serve as tellers to count the ballots for managers of the Johnson impeachment, the Speaker appointed all from the majority party.

In the balloting for managers of the Johnson impeachment nominations were made before the vote.

[32] House Journal, pp. 439–450; Globe, pp. 1603–1618.
[33] House Journal, p. 450; Globe, p. 1618.

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Mr. Speaker Colfax held that when managers of an impeachment were elected by ballot the managers, and not the House, chose the chairman.

Usage of the House in the selection of chairman of the managers of an impeachment. (Footnote.)

The House excused one Member from voting on the ballot for managers of the Johnson impeachment, but refused to excuse others.

It appears that the minority party generally refrained from participating in the ballot for managers of the Johnson impeachment.

Forms of resolutions providing for carrying to the Senate the articles impeaching President Johnson and notifying the Senate thereof.

Then, under the order, the House proceeded [34] to choose, by ballot, seven managers to conduct the impeachment.

The Speaker appointed as tellers Messrs. Luke P. Poland, of Vermont, Rufus P. Spalding, of Ohio; Thomas A. Jenckes, of Rhode Island; and Samuel S. Marshall, of Illinois. All of these but Mr. Marshall were of the number voting for the articles of impeachment. Mr. Marshall, at his request, was excused, and Mr. Samuel J. Randall, of Pennsylvania, was appointed, but he asked to be excused, on the ground that he did not wish in any way to participate in the proceedings. Mr. William E. Niblack, of Indiana, further said that the minority party did not intend to vote for managers.

The Speaker,[35] understanding the minority did not wish to be represented, appointed Mr. Austin Blair, of Michigan, as fourth teller.

Mr. Luke P. Poland, of Vermont, nominated the following for managers:

Thaddeus Stevens, of Pennsylvania; Benjamin F. Butler, of Massachusetts; John A. Bingham, of Ohio; George S. Boutwell, of Massachusetts; James F. Wilson of Iowa; Thomas Williams, of Pennsylvania; John A. Logan, of Illinois.

Mr. John A. Peters, of Maine, rising to a parliamentary inquiry, asked if the order in which the names were presented would determine who should be chairman.

The Speaker said:

The Chair can not answer that question. It is a matter that does not affect the House of Representatives. The managers are to present themselves at the bar of the Senate. They can settle that matter among themselves.

Mr. Halbert E. Pine, of Wisconsin, then asked:

Suppose members should designate on their ballots their choice for chairman, would the gentleman having the greatest number of votes as such be the chairman?

The Speaker said:

The Chair would not declare any such result, because it is not in accordance with the usage for the House to select a chairman. In the case of the impeachment of Judge Chase, in which Mr. John Randolph was the leading manager, the House did not select him as such; he was simply selected by the managers themselves, they deeming it proper to have him act as their spokesman.[36]

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[34] House Journal, pp. 450, 451; Globe, pp. 1618, 1619.

[35] Schuyler Colfax, of Indiana, Speaker.

[36] In trial of Judge Humphreys, where the managers were appointed by the Speaker, the first named acted as chairman. In the Belknap trial the managers were chosen by resolution, and the principle was recognized that the first named should be chairman.

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Mr. Michael C. Kerr, of Indiana, on his request, was excused from voting. Then, a proposition to excuse all who wished to be excused was objected to, the Chair declining to entertain it except by unanimous consent.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, said:

The members on this side do not wish to vote, as they are in favor of no part of this proceeding, and I know of no way by which they can be forced to vote. Therefore there is no necessity for excusing them.

The ballot resulted as follows:

Whole number of votes, 118; necessary to a choice, 60; of which—

John A. Bingham received	114	G. W. Scofield	3
George S. Boutwell	113	Luke P. Poland	3
James F. Wilson	112	G. S. Orth	2
Benjamin F. Butler	108	John A. Peters	1
Thomas Williams	107	Austin Blair	1
John A. Logan	106	J. C. Churchill	1
Thaddeus Stevens	105	J. F. Benjamin	1
Thomas A. Jenckes	22	C. Upson	1

The Speaker thereupon announced the names of the seven elected.

Then, on motion of Mr. Boutwell, the following resolutions were agreed to:

Resolved, That a message be sent to the Senate to inform them that this House have appointed managers to conduct the impeachment against the President of the United States, and have directed the said managers to carry to the Senate the articles agreed upon by this House, to be exhibited in maintenance of their impeachment against said Andrew Johnson, and that the Clerk of the House do go with said message.

Resolved, That the articles agreed to by this House, to be exhibited in the name of themselves and of all the people of the United States against Andrew Johnson, President of the United States, in maintenance of their impeachment against him of high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

2418. President Johnson's impeachment, continued.

It was held in the Johnson impeachment that the managers or any Member of the House might propose an additional article as a question of privilege.

After the House had agreed to articles impeaching President Johnson the managers reported two additional articles, which were also agreed to.

On the tenth and eleventh articles in the Johnson impeachment the House, after debate, concluded to impeach for other than indictable offenses.

On March 3,[37] in the House, Mr. Benjamin F. Butler, of Massachusetts, from the managers and by their instruction, reported an additional article of impeachment. This article Mr. Butler had previously offered as an amendment,[38] but it had been rejected in Committee of the Whole by a vote of ayes 45, noes 56, on a statement of Mr. James F. Wilson, of Iowa, that the committee appointed to frame articles had already considered it and determined against it. The article proposed (which subsequently became Article X of the articles as presented in the Senate) charged the President with bringing his office into contempt by his utterances.

[37] House Journal, pp. 461–464; Globe, pp. 1638–1642.
[38] Globe, pp. 1615, 1616.

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Mr. William S. Holman, of Indiana, made the point of order that this was an amendment to a proposition not before the House:

The Speaker [39] said:

The Chair rules, as he has ruled in all such cases, that this is a privileged question. And the Chair will also refer to the following paragraph of the original report adopted by the House yesterday:

"And the House of Representatives by protestation, savings to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson," etc.

Mr. Charles A. Eldridge, of Wisconsin, made the further point of order that the managers might not report additional articles. Their functions were different from those of the committee appointed to prepare articles

The Speaker ruled:

The Chair overrules the point of order on two grounds. In the first place, the usage of the House has been, in all cases of impeachment, that the replication made by the person accused should be referred to the managers, to which the managers prepare a reply and submit it to the House before it is sent to the Senate. This follows precisely the language of the report adopted by the House on yesterday. * * * The second ground is this: That any Member of the House of Representatives, whether one of the board of managers or not, can, as a question of privilege, propose additional articles of impeachment. The Chair makes his ruling so broad in order to cover the entire case. Such article of impeachment may come with more formality from the board of managers, or from a committee specially appointed for the purpose. But the Member from Wisconsin [Mr. Eldridge], if he sees proper to do so, or any other Member, can propose articles of impeachment against any officer of the Government.

Mr. Butler explained the purpose of the article, saying that it followed the precedent of the eighth article of those preferred against Judge Chase, which received more votes in favor of conviction than any other.

Mr. Frederick E. Woodbridge, of Vermont, who had joined with Mr. James F. Wilson, of Iowa, in arguing that impeachment might be had only for indictable offenses, and whose views had been followed by the House in the first attempt at impeachment, now said: [40]

I wish simply to say now, in order that the gentleman from Massachusetts [Mr. Butler] may answer the objection, that I am opposed to this article for two reasons. The first is that if the President of the United States is put on his trial under this specification it will take a long time, almost equal, perhaps if the counsel desire it, to the Warren Hastings trial, which, I believe, was about seven years. For that, if for no other reason, I should be opposed to this article.

The other reason is that there is no offense charged under which a conviction can be had: The article concludes as follows:

"Which said utterances, declarations, threats, and harangues, highly censurable in any, and peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Johnson, President of the United States, did commit, and was then and there guilty of, a high misdeameanor in office."

Now, sir, there are under the Constitution but two offenses under which a conviction can be had, namely: High crimes and misdemeanors. Neither of these is charged in this article. It is not a crime or misdemeanor in the President to bring himself into public obloquy before the people by reason of his improper speech. It is not a crime for him to make remarks when "swinging round the circle" or elsewhere, that may be distasteful to the Congress of the United States or that may be very improper. I have yet to learn that the President of the United

[39] Schuyler Colfax, of Indiana, Speaker. Globe, p. 1638.
[40] Globe, pp. 1640, 1641.

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States, or any civil officer, can be impeached, except for a high crime or misdemeanor. The gentleman will not pretend that he has set forth either in this article. He only states that the President had brought himself into public disgrace by reason of public speeches which he made before the country. Now, all I ask of my friend is that he will so frame his article that at least the Senate, sitting as a high court of impeachment, may entertain it as being properly charged.

To this Mr. Butler replied:

What is the proposition of those gentlemen who insist that the President can be impeached for those acts only which are indictable as crimes under some statute? * * * Now, what is this proposition? The proposition is this, that for the lowest degree of indictable crime, to wit: An assault and battery, or, as a friend suggests, selling liquor without license, the President of the United States may be impeached, but he can not be impeached when he usurps the liberties of the people, because there is no indictment under any statute against that. He may be impeached for selling liquor without a license, but he can not be impeached if he gets into an open barouche with two abandoned women, one on each side of him, roaring drunk, and rides up and down Pennsylvania avenue, because there is no statute that I know of against that. He can not be impeached for any violation of public decency which does not happen to be an indictable crime. He can not be impeached for debasing his high office. The statement of this proposition is its best refutation. Here let me say to my friend from Vermont that I have not charged in this article that the President has brought himself into ridicule and contempt. If he had only done that I should have been quite willing to let him go unpunished [laughter], but I do say that he brought the high office which he fills—no, which he occupies—into sovereign disgrace, ridicule, and contempt, so that it is hardly respectable for a decent man to fill hereafter; and is not that an impeachable misdeameanor? I do not stand upon this point on the weight of authority of my own words alone. I stand upon the authority of one of the best lawyers that ever sat upon the bench, Judge Story, of the Supreme Court of the United States, who uses these words to define what is impeachable:

"It is a proceeding, probably the fairest that could be devised, by which the people, through the action of that branch of the Government which most directly and fully represents themselves, call in question the fitness of their public officers, and dismiss them if unfit." (Story on the Constitution, sec. 810.)

Now, is there any one in this House, or outside of this House anywhere in the country, who would vote that Andrew Johnson is a "fit" man to be President of the United States? Who will say "ay" to that anywhere? This article has been drawn exactly within the precedent of Judge Chase's case. Of all the great lawyers who defended Judge Chase—and he had one, Mr. Wirt, who argued two days in succession for him—no one ventured to say to the Senate that that article, if proved, was not a misdemeanor within the provisions of the Constitution.

Mr. James F. Wilson, of Iowa, stated that he was the only one of the managers who opposed the article. He did so because he believed the offense not impeachable and because the article would prolong the trial.

The question being taken on the article, it was agreed to, yeas 87, nays 43. Both Messrs. Woodbridge and Wilson voted against it.

Mr. Bingham, by the unanimous instruction of the managers, presented another article, which was agreed to, yeas 108, nays 82,[41] and which became Article XI.

2419. President Johnson's impeachment, continued.

The House gave to the managers appointed for the Johnson trial the power to send for persons and papers.

The articles of impeachment of President Johnson having been amended, the House gave a new direction for carrying them to the Senate.

[41] House Journal, pp. 464, 465; Globe, p. 1642.

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The message from the House announcing that articles of impeachment would be presented against President Johnson contained the names of the managers.

The Senate having informed the House of its readiness to receive the managers with the articles impeaching President Johnson, the House as Committee of the Whole attended its managers to the Senate.

Then Mr. Bingham offered the following resolutions:

Resolved, That the articles agreed to by the House this day, together with those adopted by the House on yesterday, to be exhibited in the name of the House of Representatives and of all the people of the United States against Andrew Johnson, President of the United States, in maintenance of their impeachment against him for high crimes and misdemeanors in office, be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to appoint a clerk and a messenger, to be paid for their services at the usual rates during the time that they are employed, and that the managers have power to send for persons and papers.

Mr. James Brooks, of New York, questioned the propriety of giving to the managers the power to send for persons and papers; but the resolutions were agreed to by the House, yeas 96, nays 27.[42]

On March 3,[43] in the Senate, the following message was received from the House by its Clerk:

Mr. President, I am directed to inform the Senate that the House of Representatives has appointed Mr. John A. Bingham, of Ohio; Mr. George S. Boutwell, of Massachusetts; Mr. James F. Wilson, of Iowa; Mr. B. F. Butler, of Massachusetts; Mr. J. A. Logan, of Illinois; Mr. Thomas Williams, of Pennsylvania, and Mr. Thaddeus Stevens, of Pennsylvania, managers to conduct the impeachment against Andrew Johnson, President of the United States, and has directed the said managers to carry to the Senate the articles of impeachment agreed upon by the House, to be exhibited in maintenance of their impeachment against the said Andrew Johnson.

Thereupon Mr. Jacob M. Howard, of Michigan, offered the following, which was agreed to:

Ordered, That the Secretary of the Senate inform the House of Representatives that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against Andrew Johnson, President of the United States.

On March 4,[44] in the House, Mr. Bingham presented this resolution, which was agreed to:

Resolved, That the House resolve itself into the Committee of the Whole and attend the managers appointed by the House to the Senate to present, by its managers, the articles of impeachment exhibited by the House against Andrew Johnson, President of the United States.

Thereupon the Speaker said:

In the absence of the senior Member of the House, Mr. Washburne, of Illinois, the gentleman from Massachusetts, Mr. Dawes, will please take the chair in Committee of the Whole. The Committee of the Whole, preceded by its chairman, who will be supported by the Clerk and Doorkeeper, will follow the managers to the Senate Chamber.

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[42] House Journal, p. 466; Globe, pp. 1642, 1643.
[43] Senate Journal, pp. 254, 255; Globe, p. 1622.
[44] House Journal, p. 470; Globe, p. 1661.

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Accordingly, at 1 o'clock p.m., the House, as in the Committee of the Whole preceded by its chairman, Mr. Dawes, who was supported by the Clerk and Doorkeeper of the House, followed the managers of the House to the Senate Chamber

2420. President Johnson's impeachment, continued.

The ceremonies of presenting the articles impeaching President Johnson at the bar of the Senate.

At the presentation of the articles impeaching President Johnson the Speaker was, by order of the Senate, escorted to a seat beside the President pro tempore.

Form of declaration of the chairman of the managers of their readiness to present to the Senate the articles impeaching President Johnson.

The articles impeaching President Johnson.

The articles impeaching President Johnson were read by the chairman of the managers and delivered at the table of the Secretary.

The articles impeaching President Johnson were signed by the Speaker and attested by the Clerk.

The report to the House of the presentation of articles impeaching President Johnson was made by the chairman of the Committee of the Whole.

Mr. Speaker Colfax held that the managers of an impeachment were not a committee. (Footnote.)

The articles impeaching President Johnson were received by the Senate with the President pro tempore presiding.

In the Senate Chamber,[45] when the managers [46] appeared at the bar, their presence was announced by the Sergeant-at-Arms of the Senate.

The President pro tempore [47] (for the Senate had not yet organized for the trial) said:

The managers of the impeachment will advance within the bar and take the seats provided for them.

The managers did this.

Thereupon, at the suggestion of Mr. Thomas A. Hendricks, of Indiana, a Senator, a seat was provided for the Speaker of the House by the side of the President of the Senate, and the Speaker was escorted by Mr. James W. Grimes, of Iowa, a Senator, to a seat at the right of the President pro tempore.

Mr. Manager Bingham then said:

Mr. President, the managers of the House of Representatives, by order of the House, are ready at the bar of the Senate, whenever it may please the Senate to hear them, to present articles of impeachment and in maintenance of the impeachment preferred against Andrew Johnson, President of the United States, by the House of Representatives.

The President pro tempore said:

The Sergeant-at-Arms will make proclamation.

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[45] Senate Journal, pp. 260–268; Globe, pp. 1647–1649.

[46] The managers are not a committee, Mr. Speaker Colfax said: "The managers have been called a board of managers. Their official title is simply managers. They are not a committee." Globe, p. 1660.

[47] Benjamin F. Wade of Ohio, President pro tempore.

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The Sergeant-at-Arms proclaimed:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Andrew Johnson, President of the United States.

The managers then rose and remained standing, with the exception of Mr. Stevens, who was physically unable to do so, while Mr. Manager Bingham read the articles of impeachment, as follows:

Articles exhibited by the House of Representatives of the United States, in the name of themselves and all the people of the United States, against Andrew Johnson, President of the United States, in maintenance and support of their impeachment against him for high crimes and misdemeanors in office.

ARTICLE I.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirement of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the office of Secretary for the Department of War, said Edwin M. Stanton having been theretofore duly appointed and commissioned, by and with the advice and consent of the Senate of the United States, as such Secretary and said Andrew Johnson, President of the United States, on the 12th day of August, in the year of our Lord 1867, and during the recess of said Senate, having suspended by his order Edwin M. Stanton from said office, and within twenty days after the first day of the next meeting of said Senate—that is to say, on the 12th day of December, in the year last aforesaid—having reported to said Senate such suspension, with the evidence and reasons for his action in the case and the name of the person designated to perform the duties of such office temporarily until the next meeting of the Senate, and said Senate thereafterwards, on the 13th day of January, in the year of our Lord 1868, having duly considered the evidence and reasons reported by said Andrew Johnson for said suspension, and having refused to concur in said suspension, whereby and by force of the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, said Edwin M. Stanton did forthwith resume the functions of his office, whereof the said Andrew Johnson had then and there due notice, and said Edwin M. Stanton, by reason of the premises, on said 21st day of February, being lawfully entitled to hold said office of Secretary of the Department of War, which said order for the removal of said Edwin M. Stanton is, in substance, as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D.C., February 21, 1868.*

"SIR: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States you are hereby removed from office as Secretary for the Department of War, and your functions as such will terminate upon receipts of this communication.

"You will transfer to Brevet Maj. Gen. Lorenzo Thomas, Adjutant-General of the Army, who has this day been authorized and empowered to act as Secretary of War ad interim, all records, books, papers, and other public property now in your custody and charge.

"Respectfully, yours,

ANDREW JOHNSON.

"*Hon. Edwin M. Stanton, Washington, D.C.*"

Which order was unlawfully issued with intent then and there to violate the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867; and with the further intent, contrary to the provisions of said act, in violation thereof, and contrary to the provisions of the Constitution of the United States, and without the advice and consent of the Senate of the United States, the said Senate then and there being in session, to remove said Edwin M. Stanton from the office of Secretary of the Department of War, the said Edwin M. Stanton being then and there Secretary of War, and being then and there in the

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due and lawful execution and discharge of the duties of said office, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE II.

That on said 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did, with intent to violate the Constitution of the United States and the act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority, in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D. C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully yours,

ANDREW JOHNSON.

"*To Brevet Maj. Gen. Lorenzo Thomas,*
"*Adjutant-General United States Army, Washington, D. C.*"

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high misdemeanor in office.

ARTICLE III.

That said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office in this, that, without the authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment, so made by said Andrew Johnson, of said Lorenzo Thomas, is in substance as follows, that is to say:

"EXECUTIVE MANSION,
"*Washington, D. C., February 21, 1868.*

"SIR: Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully, yours, ANDREW JOHNSON.

"*To Brevet Maj. Gen. Lorenzo Thomas,*
"*Adjutant-General United States Army, Washington, D. C.*"

ARTICLE IV.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, in violation of the Constitution and laws of the United States, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, with intent, by intimidation and threats, unlawfully to hinder and prevent Edwin M. Stanton, then and there the Secretary for the Department of War, duly appointed under the laws of the United States, from holding said

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office of Secretary for the Department of War, contrary to and in violation of the Constitution of the United States and of the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, whereby said Andrew Johnson, President of the United States, did then and there commit, and was guilty of a high crime in office.

ARTICLE V.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, and on divers other days and times in said year, before the 2d day of March, A. D. 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, and with other persons to the House of Representatives unknown, to prevent and hinder the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in pursuance of said conspiracy did unlawfully attempt to prevent Edwin M. Stanton, then and there being Secretary for the Department of War, duly appointed and commissioned under the laws of the United States, from holding said office, whereby the said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE VI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas, by force to seize, take, and possess the property of the United States in the Department of War, and then and there in the custody and charge of Edwin M. Stanton, Secretary for said Department, contrary to the provisions of an act entitled "An act to define and punish certain conspiracies," approved July 31, 1861, and with intent to violate and disregard an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high crime in office.

ARTICLE VII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully conspire with one Lorenzo Thomas with intent unlawfully to seize, take, and possess the property of the United States in the Department of War, in the custody and charge of Edwin M. Stanton, Secretary for said Department, with intent to violate and disregard the act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, whereby said Andrew Johnson, President of the United States, did then and there commit a high misdemeanor in office.

ARTICLE VIII.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, with intent unlawfully to control the disbursements of the moneys appropriated for the military service and for the Department of War, on the 21st day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, did unlawfully and contrary to the provisions of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and in violation of the Constitution of the United States, and without the advice and consent of the Senate of the United States, and while the Senate was then and there in session, there being no vacancy in the office of the Secretary for the Department of War, with intent to violate and disregard the act aforesaid, then and there issue and deliver to one Lorenzo Thomas a letter of authority in writing, in substance as follows, that is to say:

"EXECUTIVE MANSION,
"Washington, D.C., February 21, 1868.

"SIR: Hon. Edwin M. Stanton having been this day removed from the office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim, and will immediately enter upon the discharge of the duties pertaining to that office.

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"Mr. Stanton has been instructed to transfer to you all the records, books, papers, and other public property now in his custody and charge.

"Respectfully yours,

ANDREW JOHNSON.

"*Brevet Maj. Gen. Lorenzo Thomas.*

"*Adjutant-General United States Army, Washington, D.C.*

whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE IX.

That said Andrew Johnson, President of the United States, on the 22d day of February, in the year of our Lord 1868, at Washington, in the District of Columbia, in disregard of the Constitution and the laws of the United States, duly enacted, as Commander in Chief of the Army of the United States, did bring before himself then and there William H. Emory, a major-general by brevet in the Army of the United States, actually in command of the Department of Washington and the military forces thereof, and did then and there, as such Commander in Chief, declare to and instruct said Emory that part of a law of the United States, passed March 2, 1867, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1868, and for other purposes," especially the second section thereof, which provides, among other things, that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army, and, in case of his inability, through the next in rank," was unconstitutional and in contravention of the commission of said Emory, and which said provision of law had been theretofore duly and legally promulgated by general order for the government and direction of the Army of the United States, as the said Andrew Johnson then and there well knew, with intent thereby to induce said Emory, in his official capacity as commander of the Department of Washington, to violate the provisions of said act, and to take and receive, act upon, and obey such orders as he, the said Andrew Johnson, might make and give, and which should not be issued through the General of the Army of the United States, according to the provisions of said act, and with the further intent thereby to enable him, the said Andrew Johnson, to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, and to unlawfully prevent Edwin M. Stanton, then being Secretary for the Department of War, from holding said office and discharging the duties thereof, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

ARTICLE X.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and the dignity and proprieties thereof, and of the harmony and courtesies which ought to exist and be maintained between the executive and legislative branches of the Government of the United States, designing and intending to set aside the rightful authority and powers of Congress, did attempt to bring into disgrace, ridicule, hatred, contempt, and reproach the Congress of the United States and the several branches thereof, to impair and destroy the regard and respect of all the good people of the United States for the Congress and legislative power thereof (which all officers of the Government ought inviolably to preserve and maintain), and to excite the odium and resentment of all the good people of the United States against Congress and the laws by it duly and constitutionally enacted; and in pursuance of his said design and intent, openly and publicly, and before divers assemblages of the citizens of the United States convened in divers parts thereof to meet and receive said Andrew Johnson the Chief Magistrate of the United States, did, on the 18th day of August, in the year of our Lord 1866, and on divers other days and times, as well before as afterwards, make and deliver with a loud voice certain intemperate, inflammatory, and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States duly enacted thereby, amid the cries, jeers, and laughter of the multitudes then assembled and within hearing, which are set forth in the several specifications hereinafter written, in substance and effect, that is to say:

Specification first.—In this, that at Washington, in the District of Columbia, in the Executive Mansion, to a committee of citizens who called upon the Presi-

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dent of the United States, speaking of an concerning the Congress of the United States, said Andrew Johnson, President of the United States, heretofore, to wit, on the 18th day of August, in the year of our Lord 1866, in a loud voice, declare in substance and effect, among other things, that is to say:

"So far as the executive department of the Government is concerned, the effort has been made to restore the Union, to heal the breach, to pour oil into the wounds which were consequent upon the struggle, and (to speak in common phrase) to prepare, as the learned and wise physician would, a plaster healing in character and coextensive with the wound. We thought, and we think, that we had partially succeeded; but as the work progresses, as reconstruction seemed to be taking place and the country was becoming reunited, we found a disturbing and marring element opposing us. In alluding to that element, I shall go no further than your convention and the distinguished gentleman who has delivered to me the report of its proceedings. I shall make no reference to it that I do not believe the time and the occasion justify.

"We have witnessed in one department of the Government every endeavor to prevent the restoration of peace, harmony, and union. We have seen hanging upon the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, while in fact it is a Congress of only a part of the States. We have seen this Congress pretend to be for the Union when its every step and act tended to perpetuate disunion and make a disruption of the States inevitable. * * * We have seen Congress gradually encroach step by step upon constitutional rights and violate, day after day and month after month, fundamental principles of the Government. We have seen a Congress that seemed to forget that there was a limit to the sphere and scope of legislation. We have seen a Congress in a minority assume to exercise power which, allowed to be consummated, would result in despotism or monarchy itself."

Specification second.—In this, that at Cleveland, in the State of Ohio, heretofore, to wit, on the 3d day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States did, in a loud voice, declare in substance and effect among other things, that is to say:

"I will tell you what I did do. I called upon your Congress that is trying to break up the Government."

* * * * * * *

"In conclusion, beside that, Congress had taken much pains to poison their constituents against him. But what had Congress done? Have they done anything to restore the union of these States? No; on the contrary, they had done everything to prevent it; and because he stood now where he did when the rebellion commenced he had been denounced as a traitor. Who had run greater risks or made greater sacrifices than himself? But Congress, factious and domineering, had undertaken to poison the minds of the American people."

Specification third.—In this, that at St. Louis, in the State of Missouri, heretofore, to wit, on the 8th day of September, in the year of our Lord 1866, before a public assemblage of citizens and others, said Andrew Johnson, President of the United States, speaking of and concerning the Congress of the United States, did, in a loud voice, declare, in substance and effect, among other things, that is to say:

"Go on. Perhaps if you had a word or two on the subject of New Orleans you might understand more about it than you do. And if you will go back—if you will go back and ascertain the cause of the riot at New Orleans, perhaps you will not be so prompt in calling out 'New Orleans.' If you will take up the riot at New Orleans and trace it back to its source or its immediate cause, you will find out who was responsible for the blood that was shed there. If you will take up the riot at New Orleans and trace it back to the Radical Congress, you will find that the riot at New Orleans was substantially planned. If you will take up the proceedings in their caucuses, you will understand that they there knew that a convention was to be called which was extinct by its power having expired; that it was said that the intention was that a new government was to be organized, and on the organization of that government the intention was to enfranchise one portion of the population, called the colored population, who had just been emancipated, and at the same time disfranchise white men. When you design to talk about New Orleans you ought to understand what you are talking about. When you read the speeches that were made, and take up the facts on the Friday and Saturday before that convention sat, you will there find that speeches were made incendi-

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ary in their character, exciting that portion of the population, the black population, to arm themselves and prepare for the shedding of blood. You will also find that that convention did assemble in violation of law, and the intention of that convention was to supersede the reorganized authorities in the State government of Louisiana, which had been recognized by the Government of the United States; and every man engaged in that rebellion in that convention, with the intention of superseding and upturning the civil government which had been recognized by the Government of the United States, I say that he was a traitor to the Constitution of the United States, and hence you find that another rebellion was commenced having its origin in the Radical Congress. * * *

"So much for the New Orleans riot. And there was the cause and the origin of the blood that was shed; and every drop of blood that was shed is upon their skirts, and they are responsible for it. I could test this thing a little closer, but will not do it here to-night. But when you talk about the causes and consequences that resulted from proceedings of that kind, perhaps as I have been introduced here and you have provoked questions of this kind, though it does not provoke me, I will tell you a few wholesome things that have been done by this Radical Congress in connection with New Orleans and the extension of the elective franchise.

"I know that I have been traduced and abused. I know it has come in advance of me here, as elsewhere, that I have attempted to exercise an arbitrary power in resisting laws that were intended to be forced upon the Government; that I had exercised that power; that I had abandoned the party that elected me, and that I was a traitor because I exercised the veto power in attempting and did arrest for a time a bill that was called a 'Freedman's Bureau' bill; yes, that I was a traitor. And I have been traduced, I have been slandered, I have been maligned, I have have been called Judas Iscariot, and all that. Now, my countrymen here to-night, it is very easy to indulge in epithets; it is easy to call a man a Judas and cry out traitor; but when he is called upon to give arguments and facts he is very often found wanting. Judas Iscariot—Judas. There was a Judas, and he was one of the twelve apostles. Oh, yes; the twelve apostles had a Christ. The twelve apostles had a Christ, and he never could have had a Judas unless he had had twelve apostles. If I have played the Judas, who has been my Christ that I have played the Judas with? Was it Thad. Stevens? Was it Wendell Phillips? Was it Charles Sumner? These are the men that stop and compare themselves with the Saviour; and everybody that differs with them in opinion, and to try and stay and arrest the diabolical and nefarious policy, is to be denounced as a Judas.

* * * * * * *

"Well, let me say to you, if you will stand by me in this action; if you will stand by me in trying to give the people a fair chance, soldiers and citizens, to participate in these offices, God being willing, I will kick them out. I will kick them out just as fast as I can.

"Let me say to you, in concluding, that what I have said I intended to say. I was not provoked into this, and I care not for their menaces, the taunts, and the jeers. I care not for threats. I do not intend to be bullied by my enemies nor overawed by my friends. But, God willing, with your help I will veto their measures whenever any of them come to me."

Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Jackson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens, whereby said Andrew Jackson, President of the United States, did commit, and was then and there guilty of, a high misdemeanor in office.

Article XI.

That said Andrew Johnson, President of the United States, unmindful of the high duties of his office and of his oath of office, and in disregard of the Constitution and laws of the United States, did heretofore, to wit, on the 18th day of August, 1866, at the city of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same; but, on the contrary, was a Congress of only part of the States, thereby denying and intending to deny that the legislation of said Congress was valid or obligatory

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upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying and intending to deny the power of the said Thirty-ninth Congress to propose amendments to the Constitution of the United States; and in pursuance of said declaration, the said Andrew Johnson, President of the United States, afterwards, to wit, on the 21st day of February, 1868, at the city of Washington, in the District of Columbia, did unlawfully and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an act entitled "An act regulating the tenure of certain civil offices," passed March 2, 1867, by unlawfully devising and contriving, and attempting to devise and contrive, means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension therefore made by said Andrew Johnson, of said Edwin M. Stanton from said office of Secretary for the Department of War, and also by further unlawfully devising and contriving, and attempting to devise and contrive, means then and there to prevent the execution of an act entitled "An act appropriations for the support of the Army for the fiscal year ending June 30, 1868, and for other purposes," approved March 2, 1867, and also to prevent the execution of an act entitled "An act to provide for the more efficient government of the rebel States," passed March 2, 1867: whereby the said Andrew Johnson, President of the United States, did then, to wit, on the 21st day of February, 1868, at the city of Washington, commit and was guilty of a high misdemeanor in office.

And the House of Representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusation or impeachment against the said Andrew Johnson, President of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said Andrew Johnson may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

SCHUYLER COLFAX,
Speaker of the House of Representatives.

Attest:

EDWARD MCPHERSON,
Clerk of the House of Representatives.

Mr. Bingham having concluded the reading of the articles of impeachment, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Bingham, then delivered the articles of impeachment at the table of the Secretary, and withdrew, accompanied by the Members of the House of Representatives.

The Committee of the Whole, having returned to the Hall of the House,[48] rose and the Speaker resumed the chair, whereupon Mr. Henry L. Dawes, of Massachusetts, the chairman, reported:

Mr. Speaker: The House in the Committee of the Whole, by order of the House, have accompanied their managers to the Senate while they represented, in the name of the House of Representatives and of all the people of the United States, articles of impeachment agreed upon by the House against Andrew Johnson, President of the United States. The President of the Senate announced that the Senate would take order in the premises, of which due notice would be given to the House of Representatives.

2421. President Johnson's impeachment, continued.

Resolution providing for introduction of the Chief Justice and the organization of the Senate for the trial of President Johnson.

[48] House Journal, p. 471; Globe, p. 1661.

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The Senate ordered a copy of its rules for the trial of President Johnson to be sent to the House.

The notice to the Chief Justice to meet the Senate for the trial of President Johnson was delivered by a committee of three Senators, who were his escort also.

In the Senate, on the same day, Mr. Howard moved [49] the adoption of the following:

Resolved, That at 1 o'clock to-morrow afternoon the Senate will proceed to consider the impeachment of Andrew Johnson, President of the United States, at which time the oath or affirmation required by the rules of the Senate sitting for the trial of an impeachment shall be administered by the Chief Justice of the United States, as the presiding officer of the Senate, sitting as aforesaid, to each member of the Senate, and that the Senate sitting as aforesaid will at the time aforesaid receive the managers appointed by the House of Representatives.

Ordered, That the Secretary lay this resolution before the House of Representatives.

Ordered, That the articles of impeachment exhibited against Andrew Johnson, President of the United States, be printed.

Ordered, That a copy of the "rules of procedure and practice in the Senate when sitting on the trial of impeachments" be communicated by the Secretary to the House of Representatives, and a copy thereof delivered by him to each member of the House.

Mr. George F. Edmunds proposed a simpler resolution, taking the ground that the pending resolution, in some respects, provided for what had already been provided in the rules. But Mr. Howard replied that the House was not obliged to take cognizance of the rules. The resolutions and orders were then agreed to as offered. The communication was duly received in the House.[50]

Thereupon, on motion of Mr. Stephen C. Pomeroy, of Kansas,

Ordered, That the notice to the Chief Justice of the United States to meet the Senate in the trial of the case of impeachment, and requesting his attendance as presiding officer, be delivered to him by a committee of three Senators, to be appointed by the Chair, who shall wait upon the Chief Justice to the Senate Chamber and conduct him to the chair.

The President pro tempore appointed Messrs. Pomeroy, Henry Wilson, of Massachusetts, and Charles R. Buckalew, of Pennsylvania, the committee.

2422. President Johnson's impeachment, continued.

The ceremonies of inducting the Chief Justice and organizing the Senate for the trial of President Johnson.

The President pro tempore left the chair at the hour for the Senate to sit for the trial of the President.

On taking the chair to preside at the trial of President Johnson the Chief Justice had the oath administered by an associate justice.

Having taken the oath himself the Chief Justice administered it to the Senators sitting for the trial of President Johnson.

After the oath had been administered to the Senators sitting for the trial of President Johnson the Sergeant-at-Arms was directed to make proclamation.

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[49] Senate Journal, p. 268; Globe, pp. 1657, 1658.
[50] House Journal, p. 475.

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The Senate having organized for the trial of President Johnson, rules were adopted and the House was notified of the organization and of readiness to receive the managers.

On March 5 [51] in the Senate the hour of 1 o'clock having arrived, the President pro tempore said:

The morning hour having expired, all legislative and executive business of the Senate is ordered to cease for the purpose of proceeding to business pertaining to the impeachment of the President of the United States. The chair is vacated for that purpose.

The President pro tempore then left the chair.

The Chief Justice of the United States entered the Chamber, accompanied by Mr. Justice Nelson, and escorted by Senators Pomeroy, Wilson, and Buckalew, the committee appointed for that purpose.

The Chief Justice took the chair and said:

Senators: I attend the Senate in obedience to your notice, for the purpose of joining with you in forming a source of impeachment for the trial of the President of the United States, and I am now ready to take the oath.[52]

The oath was administered by Mr. Justice Nelson to Chief Justice Chase in the following words:

I do solemnly swear that in all things appertaining to the trial of the impeachment of Andrew Johnson, President of the United States, I will do impartial justice according to the Constitution and laws. So help me God.

[The Senators rise when the Chief Justice entered the Chamber and remained standing till the conclusion of the administration of the oath to him.]

The CHIEF JUSTICE. Senators, the oath will now be administered to the Senators as they will be called by the Secretary in succession. [To the Secretary.] Call the roll.

The administration of the oath then proceeded until the name of Mr. Benj. F. Wade, of Ohio, was called, when a question was raised as to his competency to vote.[53]

If the managers on the part of the House of Representatives were present during this proceeding, it was informally, as no mention is made of their presence.

On March 6 [54] the question as to Mr. Wade's right to vote with withdrawn, and the administration of the oath was concluded.

Thereupon the following occurred:

All the Senators present having taken the oath required by the Constitution, the Senate is now organized for the purpose of proceeding to the trial of the impeachment of Andrew Johnson, President of the United States. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment against Andrew Johnson, President of the United States.

After the Chief Justice had submitted the question: "Shall the rules of proceeding adopted by the Senate on the 2d of March be the rules of proceeding in the trial of the impeachment?", and the same had been

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[51] Senate Journal, pp. 809, 810; Globe, p. 1671.

[52] The Journal has this record "By direction of the Chief Justice the following oath was administered to him," etc. The Senate, in adopting rules for the trial, had assumed that the Chief Justice would not be sworn. See proceedings on Rule XXIV, section 2080 of this volume.

[53] For discussion of this question see section 2061 of this volume.

[54] Senate Journal, p. 811; Globe, p. 1701.

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determined in the affirmative, Mr. Howard offered the following order, which was agreed to:

Ordered, That the Secretary of the Senate notify the House of Representatives that the Senate is now organized for the trial of the articles of impeachment against Andrew Johnson, President of the United States, and is ready to receive the managers of the impeachment at its bar.

2423. President Johnson's impeachment, continued.

The House did not attend the managers in making the formal demand that the Senate take process against President Johnson.

The House managers having demanded process against President Johnson, the Senate ordered a summons to issue, returnable on a given date.

The sessions of the Senate sitting for an impeachment trial may adjourn for more than three days.

The managers, having returned from demanding that process be issued against President Johnson, reported verbally to the House.

The managers of the impeachment of President Johnson were given leave to sit during sessions of the House and power to compel testimony.

A question had arisen in the House [55] as to whether or not the House should attend the managers, and Mr. Bingham said:

Mr. Speaker, after consultation with the managers on the part of the House, I am instructed by them to say to the House that, inasmuch as this is a mere formal proceeding to-day, they do not suppose it to be necessary or according to usage to ask the House to attend them to the bar of the Senate until the issue shall be joined.

In due time the managers (excepting Mr. Stevens), appeared [56] at the bar of the Senate, and their presence was announced by the Sergeant-at-Arms.

The Chief Justice said:

The managers of the impeachment on the part of the House of Representatives will please take the seats assigned to them.

The managers having been seated in the area in front of the chair.

Mr. Manager Bingham rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate take process against Andrew Johnson, President of the United States, that he may answer at the bar of the Senate upon the articles of impeachment heretofore preferred by the House of Representatives through its managers before the Senate.

Mr. Howard, a Senator, thereupon moved the following order, which was agreed to: [57]

Ordered, That a summons do issue, as required by the rules of procedure and practice in the Senate when sitting on the trial of impeachments, to Andrew Johnson, returnable on Friday, the 13th day of March instant, at 1 o'clock in the afternoon.

After a subject relating to an amendment of the rules had been disposed of, Mr. Howard moved that the Senate sitting for the trial of the

[55] Globe, p. 1683.
[56] Senate Journal, p. 816; Globe, p. 1701.
[57] Senate Journal, p. 823; Globe, p. 1701.

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President upon articles of impeachment,[58] adjourn to Friday, the 13th of March instant, at 1 o'clock afternoon.

This motion was agreed to, and the Chief Justice thereupon declared the Senate sitting for the trial of impeachments adjourned to the time named and vacated the chair.

The President pro tempore resumed the chair and called the Senate to order.[59]

The managers having returned to the House, appeared at the bar,[60] and being recognized by the Speaker, Mr. Bingham said:

I have the honor to report, on behalf of the managers in the matter of the impeachment of Andrew Johnson, President of the United States, that the Senate has organized for the trial of the impeachment; that in the name of the House of Representatives and in the behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Andrew Johnson, President of the United States, to answer to the articles heretofore exhibited against him at the bar of the Senate; and that the Senate has advised us that process will be issued against him in that behalf, returnable on the 13th instant, at 1 o'clock p.m.

On March 6,[61] also in the House, Mr. Bingham offered the following:

Resolved, That the managers on the part of the House, in the matter of the impeachment of the President, be, and hereby are, authorized to sit during the sessions of the House, and shall have power to send for persons and papers, administer oaths, and take the testimony of witnesses.

Mr. Bingham explained that this was desired to enable the managers to administer oaths to witnesses. The resolution was agreed to, yeas 89, nays 25.

2424. President Johnson's impeachment, continued.

Ceremonies at the return of the summons to President Johnson to appear and answer the articles of impeachment.

Form used by the Sergeant-at-Arms in Calling President Johnson to appear and answer the articles of impeachment.

President Johnson entered his appearance by a letter addressed to the Chief Justice and naming the counsel to appear for him.

President Johnson by his own letter and by a paper filed and signed by his counsel asked forty days in which to prepare his answer.

The House in Committee of the Whole, on notice from the Senate, attended on the return day of the summons to President Johnson.

The Chief Justice held, in the Senate sitting for the trial of President Johnson, that the journal should be read before other proceedings.

On March 13 [62] at 1 p.m. the Chief Justice entered the Senate Chamber, resumed the chair, and said (to the Sergeant-at-Arms):

Make proclamation.

The SERGEANT-AT-ARMS. Hear ye! hear ye. All persons are commanded to keep silence while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Andrew Johnson, President of the United States.

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[58] The Globe (p. 1701) indicates that Mr. Howard used the word "court," but the Journal does not permit the word.
[59] Senate Journal, pp. 276–823; Globe p. 1701.
[60] House Journal, p. 484; Globe, p. 1711.
[61] House Journal, p. 481; Globe, p. 1706.
[62] House Journal, p. 519; Globe, p. 1869.

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Propositions being made to notify the House of Representatives and also that several Senators be sworn, the Chief Justice said:

The first business is to read the journal of the last session of the court. The Senators will be sworn in afterwards.

The Secretary read the journal of the proceedings of the Senate sitting for the trial of impeachment of Andrew Johnson, President of the United States, on Friday, March 6, 1868.

Mr. Jacob M. Howard, of Michigan, submitted this order, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber, and ready to proceed with the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message being received in the House,[63] that body resolved itself into Committee of the Whole, with Mr. Elihu B. Washburne, of Illinois, in the chair, and thereupon attended the managers to the Senate.

The managers having appeared at the bar, were announced by the Sergeant-at-Arms and conducted to the position assigned them.

The oath was then administered to several Senators not previously sworn.

Then the following proceedings occurred:[64]

The CHIEF JUSTICE. The Secretary of the Senate will read the return of the Sergeant-at-Arms to the summons directed to be issued by the Senate.

The Chief Clerk read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Andrew Johnson, President of the United States, and the foregoing precept, addressed to me, were this day duly served on the said Andrew Johnson, President of the United States, by delivering to and leaving with him true and attested copies of the same at the Executive Mansion, the usual place of abode of the said Andrew Johnson, on Saturday, the 7th day of March instant, at 7 o'clock in the afternoon of that day.

GEORGE T. BROWN,
Sergeant-at-Arms of the United States Senate.

WASHINGTON, *March 7, 1868.*

The Chief Clerk administered to the Sergeant-at-Arms the following oath:

I, George T. Brown, Sergeant-at-Arms of the Senate of the United States, do swear that the return made and subscribed by me upon the process issued on the 7th day of March, A.D. 1868, by the Senate of the United States against Andrew Johnson, President of the United States, is truly made, and that I have performed said service therein prescribed. So help me God.

The CHIEF JUSTICE. The Sergeant-at-Arms will call the accused.

The SERGEANT-AT-ARMS. Andrew Johnson, President of the United States, Andrew Johnson, President of the United States, appear and answer the articles of impeachment exhibited against you by the House of Representatives of the United States.

There being no response, Mr. Reverdy Johnson, of Maryland, a Senator, made this suggestion:

I understand that the President has retained counsel, and that they are now in the President's room attached to this wing of the Capitol. They are not

[63] Senate Journal, p. 824; Globe Supplement, p. 6.
[64] Globe Supplement, p. 6.

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advised, I believe, of the court being organized. I move that the Sergeant-at-Arms inform them of that fact.

The CHIEF JUSTICE. If there be no objection, the Sergeant-at-Arms will so inform the counsel of the President.

The Sergeant-at-Arms presently returned with Hon. Henry Stanbery, of Kentucky; Hon. Benjamin R. Curtis, of Massachusetts, and Hon. Thomas A. R. Nelson, of Tennessee, who were conducted to the seats assigned the counsel of the President.

Then the following occurred:

The Sergeant-at-Arms announced the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. E. B. Washburne, of Illinois), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk.

The CHIEF JUSTICE (to the counsel for the President). Gentlemen, the Senate is now sitting for the trial of the President of the United States upon articles of impeachment exhibited by the House of Representatives. The court will now hear you.

Mr. STANBERY. Mr. Chief Justice, my brothers Curtis and Nelson and myself are here this morning as counsel for the President. I have his authority to enter his appearance, which, with your leave, I will proceed to read:

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Mr. CHIEF JUSTICE: I, Andrew Johnson, President of the United States, having been served with a summons to appear before this honorable court, sitting as a court of impeachment to answer certain articles of impeachment found and presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, who have my warrant and authority therefor, and who are instructed by me to ask of this honorable court a reasonable time for the preparation of my answer to said articles.

"After a careful examination of the articles of impeachment and consultation with my counsel, I am satisfied that at least forty days will be necessary for the preparation of my answer, and I respectfully ask that it be allowed.

"ANDREW JOHNSON."

The CHIEF JUSTICE. The paper will be filed.

Mr. STANBERY. Mr. Chief Justice, I have also a professional statement in support of the application. Whether it is in order to offer it now or to wait until the appearance is entered your Honor will decide.

The CHIEF JUSTICE. The appearance will be considered as entered. You may proceed.

Mr. STANBERY. I will read the statement.

"In the matter of the impeachment of Andrew Johnson, President of the United States.

"Henry Stanbery, Benjamin R. Curtis, Jeremiah S. Black, William M. Evarts, and Thomas A. R. Nelson, of counsel for the respondent, move the court for the allowance of forty days for the preparation of the answer to the articles of impeachment, and in support of the motion make the following professional statement:

"The articles are eleven in number, involving many questions of law and fact. We have, during the limited time and opportunity afforded us, considered as far as possible the field of investigation which must be explored in the preparation of the answer, and the conclusion at which we have arrived is that with the utmost diligence the time we have asked is reasonable and necessary.

"The precedents as to time for answer upon impeachments before the Senate, to which we have had opportunity to refer, are those of Judge Chase and Judge Peck.

"In the case of Judge Chase time was allowed from the 3d of January until the 4th of February next succeeding to put in his answer, a period of thirty-two days; but in this case there were only eight articles, and Judge Chase had been for a year cognizant of most of the articles, and had been himself engaged in preparing to meet them.

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"In the case of Judge Peck there was but a single article. Judge Peck asked for time from the 10th to the 25th of May to put in his answer, and it was granted. It appears that Judge Peck had been long cognizant of the ground laid for his impeachment, and had been present before the committee of the House upon the examination of the witnesses, and had been permitted by the House of Representatives to present to that body an elaborate answer to the charges.

"It is apparent that the President is fairly entitled to more time than was allowed in either of the foregoing cases. It is proper to add that the respondents in these cases were lawyers, fully capable of preparing their own answers, and that no pressing official duties interfered with their attention to that business; whereas the President, not being a lawyer, must rely on his counsel. The charges involve his acts, declarations, and intentions, as to all which his counsel must be fully advised upon consultation with him, step by step, in the preparation of his defense. It is seldom that a case requires such constant communication between client and counsel as this, and yet such communication can only be had at such intervals as are allowed to the President from the usual hours that must be devoted to his high official duties.

"We further beg leave to suggest for the consideration of this honorable court that as counsel, careful as well of their own reputation as of the interests of their client in a case of such magnitude as this, so out of the ordinary range of professional experience, where so much responsibility is felt, they submit to the candid consideration of the court that they have a right to ask for themselves such opportunity to discharge their duty as seems to them to be absolutely necessary.

"HENRY STANBERY,
"B. R. CRTIS,
"JEREMIAH S. BLACK, } per H. S.
"WILLIAM M. EVARTS, }
"THOMAS A. R. NELSON,
"Of Counsel for the Respondent.

"MARCH 13, 1868."

2425. President Johnson's impeachment, continued.

The Senate denied the motion of President Johnson's counsel that he be allowed forty days to answer and granted ten days.

The managers urged, in view of Rule VIII, that President Johnson should answer on the return day, but were overruled.

Review of English precedents as to the distinction between the pleadings and the trial of an impeachment.

The Senate deliberated in secret session on the application of President Johnson for time to prepare his answer.

The proceedings of secret sessions of the Senate in the Johnson trial appear in the Journal, but the debates were not recorded.

Immediately [65] Mr. Manager Bingham raised the question that under the language of the eighth rule the motion for continuance was not allowable, the provision of the rule being that if the respondent appeared he should answer, the terms of the rule being:

If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor, as aforesaid, or appearing shall fail to file his answer to such articles of impeachment, the trial shall proceed nevertheless as upon a plea of not guilty.

Counsel for the respondent argued that it would be oppressive for the proceedings to be so hastened, and an innovation upon even the worst precedents in English history. Assuming, apparently, that they must at once proceed to trial, they stated that they could not summon

[65] Globe Supplement, p. 7.

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their witnesses until the pleadings were prepared. Mr. Henry Stanbery further said:

Rule 9 provides:

"At 12 o'clock and 30 minutes afternoon of the day appointed for the return of the summons against the person impeached."

This is the return day; it is not the trial day. The letter answers the gentlemen. According to the letter of the eighth rule they say "this is the trial day; go on; not a moment's delay; file your answer and proceed to trial; or without your answer let a general plea of not guilty be entered, and proceed at once with the trial." The ninth rule says this is the return day, not the trial day. Then the tenth rule says:

"The person impeached shall then be called to appear and answer the articles of impeachment against him."

That is the call made on the return day. The accused is called to appear and answer. He is here; he appears; he states his willingness to answer; he only asks a reasonable time to prepare the answer. Then rule 11 speaks "of the day appointed for the trial." That is not this day. This day, the day which the gentlemen would make the first day of the trial, is, in your own rules, put down for the return day, and you must have some other day for the trial day to suit the convenience of the parties; so that the letter of one rule answers the letter of another rule.

Mr. Manager Bingham replied that the making up of the issue and the trial were distinct matters. Citing a precedent, he said:

A very remarkable case in the twelfth volume of State Trials lies before me, wherein Lord Holt presided, on the trial of Sir Richard Grahme, Viscount Preston, and others, charged with high treason. In that case the accused appeared, as the accused by the learned gentlemen appears this morning, after the indictment presented in the court, and before plea asked for continuance. The answer that fell from the lips of the Lord Chief Justice was, we are not to consider the question of trial or the time of trial until plea be pleaded. Let me give his very words:

"L. C. HOLT. My lord, we debate the time of your trial too early; for you must put yourself upon your trial first by pleading."

And when Lord Preston presses him again on the point Lord Chief Justice Holt responds:

"My lord, we can not dispute with you concerning your trial till you have pleaded. I know not what you will say to it; for aught I know there may be no occasion for a trial. I can not tell what you will plead; your lordship must answer to the indictment before we can enter into the debate of this matter." (12 State Trials, 664.)

The eighth rule of the Senate, last clause, provides that if the party appearing shall plead guilty there may be no further proceedings in the case, no trial about it; nothing remains to be done but to pronounce judgment under the Constitution. It is time enough for us to talk about a trial when we have an issue. The rule is a plain one, a simple one.

And I may be pardoned for saying that I fail to perceive anything in rules 10 or 11 to which the learned counsel have referred that by any kind of construction can be supposed to limit the effect of the words in rule 8, to wit:

"If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or appearing shall fail to file his answer [on the day on which he is summoned to appear] the trial shall proceed nevertheless as upon a plea of not guilty."

When words are plain in a written law there is an end to all construction; they must be followed. The managers so thought when they appeared at this bar. All they ask is the enforcement of the rule, not a postponement of forty days, and at the end of that time to be met with a dilatory plea—a motion, if you please—to quash the articles, or a question raising the inquiry whether this is the Senate of the United States.

The Chief Justice being about to put the motion submitted by the counsel for the respondent, Mr. George F. Edmunds, of Vermont, submitted [66] the following:

[66] Senate Journal, p. 826; Globe Supplement, p. 826.

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Ordered, That the respondent file his answer to the articles of impeachment on or before the 1st day of April next, and that the managers of the impeachment file their replication thereto within three days thereafter, and that the matter stand for trial on Monday, April 6, 1868.

Then, on motion of Mr. Oliver P. Morton, of Indiana, it was voted "that the Senate retire to deliberate and confer in regard to its determination of the question." The Journal indicates that the Chief Justice retired with the Senate. The proceedings during the secret session were recorded in the Journal,[67] but not in the report of the trial. As soon as the Senate had assembled in the conference chamber, Mr. Charles D. Drake, of Missouri, moved [68] to strike out of Mr. Edmunds's resolution all after the word "*Resolved*" and insert: "That the respondent file answer to the articles of impeachment on or before Friday, the 20th day of March instant."

At first this was agreed to, yeas 28, nays 20, but on motion of Mr. Lyman Trumbull, of Illinois, and by a vote of yeas 27, nays 23, the vote was reconsidered, and then Mr. Drake's amendment was amended by striking out the words "Friday, the 20th," and inserting "Monday, the 23d." The amendment as amended was agreed to, and then the order as amended was agreed to.

The Senate then returned to its Chamber; and the Chief Justice announced to the counsel for the President that their motion to be allowed forty days to prepare and file answer to the articles of impeachment was denied, and that the Senate had adopted the following order:

Ordered, That the respondent file answer to the articles of impeachment on or before Monday, the 23d day of March instant.

2426. President Johnson's impeachment, continued.

After argument as to the propriety of delay, the Senate determined that the trial of President Johnson should proceed immediately after replication should be filed.

The Chief Justice held, in the Johnson impeachment, that both managers and counsel might be heard on a motion of a Senator to fix the time for the trial to begin.

Then, by instruction of the managers, Mr. Manager Bingham submitted [69] the following motion:

The managers ask the Senate respectfully to adopt the following order:

"*Ordered*, That upon the filing of a replication by the managers on the part of the House of Representatives the trial of Andrew Johnson, President of the United States, upon the articles of impeachment exhibited by the House of Representatives shall proceed forthwith."

The question being put on agreeing to the order, there appeared, yeas 25, nays 26. So the order was disagreed to.

Thereupon, Mr. John Sherman, of Ohio, a Senator, offered [70] the following:

Ordered, That the trial of the articles of impeachment shall proceed on the 6th day of April next.

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[67] In former trials the Journal did not record the secret sessions. It seems to have been considered that the Constitution and the rules required the Journal to be kept. See remarks of Mr. Edmunds, Globe, p. 1886.

[68] Senate Journal, pp. 826, 827.

[69] Senate Journal, p. 827; Globe Supplement, p. 8.

[70] Senate Journal, pp. 827, 828; Globe Supplement, pp. 8–11.

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Mr. Henry Wilson, of Massachusetts, a Senator, moved to amend by striking out "the 6th day of April" and inserting "the 1st day of April."

Mr. Manager Butler thereupon asked if the managers might be heard on the motion.

The Chief Justice replied:

The Chair is of opinion that the managers have a right to be heard and also the counsel for the accused.

Mr. Manager Butler thereupon argued for a speedy trial. The precedents for delay, which might be cited from the case of Judge Chase, were not applicable, since the railroads and telegraph had revolutionized means of communication. As justifying and enforcing the need of expedition, Mr. Butler said:

The ordinary delays in court, the ordinary time given in ordinary cases for men to answer when called before tribunals of justice, have no application to this case. The rules by which cases are heard and determined before the Supreme Court of the United States are not rules applicable to the case at bar; and for this reason, if for no other, when ordinary trials are had, when ordinary questions are examined at the bar of any court, there is no danger to the common weal in delay. the Republic may take no detriment if the trial is postponed; to give the accused time injures nobody; to grant him indulgence hurts no one, and may help one, and perhaps an innocent man. But here the House of Representatives have presented at the bar of the Senate, in the most solemn form, the Chief Executive officer of the nation. They say (and they desire your judgment upon their accusation) that he has usurped power which does not belong to him; that he is at this very time breaking the laws solemnly enacted by you, the Senate, and those who present him here, the Congress of the United States, and that he still proposes so to do.

Sir, who is the criminal—I beg pardon for the word—the respondent at the bar? He is the Chief Executive of the nation, and when I have said that, I have taken out from all ordinary rules this trial, because I submit with deference that here and now, for the first time in the history of the world, has any nation brought its ruler to the bar of its highest tribunal in a constitutional method, under the rules and forms prescribed by its Constitution, and therefore all the rules, all the analogies, all the likeness to a common and ordinary trial of any cause, civil or criminal, cease at once, are silent, and ought not to weigh in judgment. Other nations have tried and condemned their kings and rulers, but the process has always been in violence and subversive of their constitutions and framework of government, not in submission to and accordance with it.

When I name the respondent as the Chief Executive, I say he is the Commander in Chief of your armies; he specially claims that command, not by force and under the limitations of your laws, but as a prerogative of his office and subject to his arbitrary will. He controls, through his subordinates, your Treasury. He commands your Navy. Thus he has all elements of power. He controls your foreign relations. In any hour of passion, of prejudice, of revenge for fancied wrong in his own mind, he may complicate your peace with any nation of the earth, even while he is being arraigned as a respondent at your bar. And mark me, sir, may I respectfully submit that the very question here at issue this day and this hour is, whether he shall control beyond the reach of your laws, and outside of your laws, the Army of the United States. The one greatest of all questions here at issue is whether he shall be able, against law—setting aside your laws, setting aside the decrees of the Senate, setting aside the laws enacted by Congress, overriding the legislative power of the country, claiming it as in attribute of executive power only, to control the great military arm of this Government, and control it if he chooses at his own good pleasure, its your ruin and the ruin of the country.

Mr. Nelson, counsel for the respondent, in pleading for delay, said:

Mr. Chief Justice, I need not tell you, nor need I tell many of the honorable Senators whom I address on this occasion, many of whom are lawyers, many of whom have been clothed in times past with the judicial ermine, that in the courts of law the vilest criminal who ever was arraigned in the United States has been given time for preparation, time for hearing. The Constitution of the

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country secure to the vilest man in the land the right not only to be heard himself, but to be heard by counsel; and no matter how great his crime, no matter how deep may be the malignity of the offense with which he is charged, he is tried according to the forms of law; he is allowed to have counsel; continuances are granted to him; if he is unable to obtain justice, time is given to him, and all manner of preparation is allowed him.

If this is so in courts of common law, that are fettered and bound by the iron rules to which I have adverted, how much more in a great tribunal like this that does not follow the precedents of law, but that is aiming and seeking alone to attain justice, ought we to be allowed ample time for preparation in reference to charges of the nature which we have here? How much more, sir, should such time be given us?

We are told that the President acted in regard to one of the matters which is charged against him by the House of Representatives on the 21st of February, and that by the 4th of March—if I did not mistake the statement of the honorable manager—the House of Representatives had presented this accusation against the President of the United States; and, that, therefore, the President, who knew what he was doing, should be prepared for his defense. Mr. Chief Justice, is it necessary for me to remind you and honorable Senators that you can upon a page of foolscap paper prepare a bill of indictment against an individual which may require weeks in the investigation? Is it necessary for me to remind this honorable body that it is an easy thing to make charges, but that it is often a laborious and difficult thing to make a defense against those accusations?

Reasoning from the analogy furnished by such proceedings at law, I earnestly maintain before this honorable body that suitable time should be given us to answer the charges which are made here. A large number of these charges—those of them connected with the President's action in reference to the Secretary of War—involve questions of the deepest importance. They involve an inquiry running back to the very foundation of the Government; they involve an examination of the precedents which have been set by different administrations; they involve, in short, the most extensive range of inquiry. The two last charges that were presented by the House of Representatives, if I may be pardoned for using the expression in the view which I entertain of them, open Pandora's box, and will cause an investigation as to the great differences of opinion which have existed between the President and the House of Representatives, an inquiry which, so far as I can perceive, will be almost interminable in its character.

Mr. Manager Bingham, in arguing against delay, commented on the fact that no formal application had been made by the accused himself for delay. Mr. Bingham also referred to the fact that in the case of Judge Chase the trial had been ordered to proceed on the day the answer was received.

Mr. Roscoe Conkling, of New York, a Senator, proposed to the order offered by Mr. Sherman this amendment:

Strike out all after the word "ordered" and insert: "That unless otherwise ordered by the Senate, for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed."

This amendment was agreed to—yeas 40, nays 10; and then the order as amended was agreed to, as follows:

Ordered, That, unless otherwise ordered by the Senate for cause shown, the trial of the pending impeachment shall proceed immediately after replication shall be filed.

Then, on motion of Mr. Jacob M. Howard, of Michigan,

the Senate sitting for the trial of the President upon articles of impeachment, adjourned to Monday, the 23d day of March instant, at 1 o'clock p.m.

2427. President Johnson's impeachment, continued.

The House, by a standing order, determined to attend in Committee of the Whole, the trial of President Johnson.

Forms of procedure at the change in the Senate form a legislative session to a session for the trial of the President.

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During the trial of the President the Chief Justice was escorted to the chair by the chairman of a committee of the Senate.

The House attended at each session of the trial of the President on notice from the Senate.

The sessions of the Senate for the trial of the President were opened by proclamation.

The managers were announced when they attended in the Senate for the trial of the President, but the counsel for respondent entered unannounced.

The House of Representatives was announced when, as a Committee of the Whole, it attended the trial of the President.

On March 20,[71] in the House, Mr. George Boutwell, under suspension of the rules, presented the following resolutions, which was agreed to by the House without division:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives, the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

On March 23,[72] in the House, a message was received from the Senate by their Secretary, that—

the Senate is in its Chamber and ready to proceed on the trial of Andrew Johnson, President of the United States, and that seats are provided for the accommodation of the Members.

This message was ordered by the Senate before the Chief Justice had taken his seat as Presiding Officer.[73]

Thereupon, on motion of Mr. Elihu B. Washburne, of Illinois, the House resolved itself into a Committee of the Whole and with Mr. Washburne as chairman proceeded to the Senate.

In the Senate, at the hour of 1 o'clock, the President pro tempore [74] said: [75]

According to the order of the Senate, the chair will be now vacated, that the Senate may be presided over by the Chief Justice of the United States for the trial of the impeachment.[76]

Thereupon the Chief Justice of the United States entered the Senate Chamber, escorted by Mr. Pomeroy, the chairman of the Senate committee heretofore appointed for that purpose, and took the chair.

The Sergeant-at-Arms made proclamation in the prescribed form; the managers on the part of the House of Representatives appeared, their presence was announced by the Sergeant-at-Arms, and they took their seats; the counsel for the President appeared and took seats, apparently without announcement, and then the Sergeant-at-Arms announced the presence of the House of Representatives; and the Committee of the Whole House, headed by Mr. E. B. Washburne, of Illinois, the Chairman of the Committee of the Whole, and the Clerk of the House, entered the Chamber, and the Members were conducted to the seats assigned them.

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[71] Second session Fortieth Congress, House Journal, pp. 549, 550; Globe, p. 2021.
[72] House Journal, p. 561; Globe, p. 2071.
[73] Globe, pp. 2068, 2069; Senate Journal, p. 334.
[74] B. F. Wade, of Ohio, President pro tempore.
[75] Senate Journal, p. 334; Globe, p. 2069.
[76] Globe supplement, p. 11.

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A Senator who had not taken the oath was sworn, and then the Journal of the preceding sitting was read.[77]

2428. President Johnson's impeachment, continued.

The answer of President Johnson to the articles of impeachment.

The answer of the President took up the articles one by one, denying some of the charges, admitting others, but denying that they set forth impeachable offenses and excepting to the sufficiency of others.

President Johnson's answer was signed by himself and counsel.

In his answer President Johnson referred to the Senate as a court.

The answer by President Johnson to the articles of impeachment was accompanied by two exhibits.

The answer of President Johnson to the articles of impeachment was read by his counsel.

After this disposition of a question relating to the competency of the Senate to proceed with the case,[78] the counsel for the President filed his answer and by direction of the Chief Justice read it,[79] beginning in form as follows:

Senate of the United States, sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States.

The answer of the said Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives of the United States.

ANSWER TO ARTICLE I

For answer to the first article he says: That * * *, etc.

The answer then proceeds, article by article:

ARTICLE I. The answer reviews at length the transactions with reference to Secretary Stanton and concludes with these specific denials:

And this respondent, proceeding to answer specifically each substantial allegation in the said first article, says: He denies that the said Stanton, on the 21st day of February, 1868, was lawfully in possession of the said office of Secretary for the Department of War. He denies that the said Stanton, on the day last mentioned, was lawfully entitled to hold the said office against the will of the President of the United States. He denies that the said order for the removal of the said Stanton was unlawfully issued. He denies that the said order was issued with intent to violate the act entitled "An act to regulate the tenure of certain civil offices." He denies that the said order was a violation of the last-mentioned act. He denies that the said order was a violation of the Constitution of the United States, or of any law thereof, or of his oath of office. He denies that the said order was issued with an intent to violate the Constitution of the United States or any law thereof, or this respondent's oath of office; and he respectfully, but earnestly, insists that not only was it issued by him in the performance of what he believed to be an imperative official duty, but in the performance of what this honorable court will consider was, in point of fact, an imperative official duty. And he denies that any and all substantive matters, in the said first article contained, in manner and form as the same are therein stated and set forth, do, by law, constitute a high misdemeanor in office, within the true intent and meaning of the Constitution of the United States.

[77] Senate Journal, pp. 828, 829; Globe, pp. 11, 12.
[78] See section 2060 of this volume.
[79] Senate Journal, pp. 829–860; Globe supplement, pp. 12–22.

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ART. II. The answer in full is as follows:

And for answer to the second article, this respondent says that he admits he did issue and deliver to said Lorenzo Thomas the said writing set forth in said second article, bearing date at Washington, D.C., February 21, 1868, addressed to Bvt. Maj. Gen. Lorenzo Thomas, Adjutant-General United States Army, Washington, D.C., and he further admits that the same was so issued without the advice and consent of the Senate of the United States, then in session, but he denies that he thereby violated the Constitution of the United States, or any law thereof, or that he did thereby intend to violate the Constitution of the United States, or the provisions of any act of Congress; and this respondent refers to his answer to said first article for a full statement of the purposes and intentions with which said order was issued, and adopts the same as part of his answer to this article; and he further denies that there was then and there no vacancy in the said office of Secretary for the Department of War, or that he did then and there commit, or was guilty of a high misdemeanor in office, and this respondent maintains and will insist:

1. That at the date and delivery of said writing there was a vacancy existing in the office of Secretary for the Department of War.

2. That, notwithstanding the Senate of the United States was then in session, it was lawful and according to long and well established usage to empower and authorize the said Thomas to act as Secretary of War ad interim.

3. That, if the said act regulating the tenure of civil offices be held to be a valid law, no provision of the same was violated by the issuing of said order or by the designation of said Thomas to act as Secretary of War ad interim.

ART. III. The answer is as follows, in full:

And for answer to said third article this respondent says that he abides by his answer to said first and second articles, in so far as the same are responsive to the allegations contained in the said third article, and, without here again repeating the same answer, prays the same be taken as an answer to this third article as fully as if here again set out at length, and as to the new allegation contained in said third article, that this respondent did appoint the said Thomas to be Secretary of the Department of War ad interim, this respondent denies that he gave any other authority to said Thomas than such as appears in said written authority set out in said article, by which he authorized and empowered said Thomas to act as Secretary for the Department of War ad interim, and he denies that the same amounts to an appointment and insists that it is only a designation of an officer of that Department to act temporarily as Secretary for the Department of War ad interim until an appointment should be made. But, whether the said written authority amounts to an appointment or to a temporary authority or designation, this respondent denies that in any sense he did thereby intend to violate the Constitution of the United States, or that he thereby intended to give the said order the character or effect of an appointment in the constitutional or legal sense of that term. He further denies that there was no vacancy in said office of Secretary for the Department of War existing at that date of said written authority.

ART. IV. In answer to Article IV the charge of conspiracy was denied, as also the charge that intimidation and threats were used in connection with the attempt to supersede Secretary Stanton by General Thomas; and in concluding, the following exception is taken:

This respondent doth here except to the sufficiency of the allegation contained in said fourth article, and states for ground of exception that it is not stated that there was any agreement between this respondent and the said Thomas, or any other person or persons, to use intimidation and threats, nor is there any allegation as to the nature of and intimidation and threats, or that there was any agreement to carry them into execution, or that any step was taken or agreed to be taken to carry them into execution, and that the allegation in said article that the intent of said conspiracy was to use intimidation and threats is wholly insufficient, inasmuch as it is not alleged that the said intent formed the basis or became a part of any agreement between the said alleged conspirators, and, furthermore, that there is no allegation of any conspiracy or agreement to use intimidation or threats.

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ART. V. The answer in full, with an exception:

And for answer to the said fifth article this respondent denies that on the said 21st day of February, 1868, or at any other time or times in the same year before the said 2d day of March, 1868, or at any prior or subsequent time, at Washington aforesaid or at any other place, this respondent did unlawfully conspire with the said Thomas, or with any other person or persons, to prevent or hinder the execution of the said act entitled "An act regulating the tenure of certain civil offices," or that, in pursuance of said alleged conspiracy, he did unlawfully attempt to prevent the said Edwin M. Stanton from holding said office of Secretary for the Department of War, or that he did thereby commit, or that he was thereby guilty of, a high misdemeanor in office. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, begs leave to refer to his answer given to the fourth article and to his answer given to the first article as to his intent and purpose in issuing the orders for the removal of Mr. Stanton and the authority given to the said Thomas, and prays equal benefit therefrom as if the same were here again repeated and fully set forth.

And this respondent excepts to the sufficiency of the said fifth article, and states his ground for such exception, that it is not alleged by what means or by what agreement the said alleged conspiracy was formed or agreed to be carried out, or in what way the same was attempted to be carried out, or what were the acts done in pursuance thereof.

ART. VI. The answer in full:

And for answer to the said sixth article, this respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time or place, he did unlawfully conspire with the said Thomas by force to seize, take, or possess, the property of the United States in the Department of War, contrary to the provisions of the said acts referred to in the said article, or either of them, or with intent to violate either of them. Respondent, protesting that said Stanton was not then and there Secretary for the Department of War, not only denies the said conspiracy as charged, but also denies any unlawful intent in reference to the custody and charge of the property of the United States in the said Department of War, and again refers to his former answers for a full statement of his intent and purpose in the premises.

ART. VII. The answer in full:

And for answer to the said seventh article respondent denies that on the said 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did unlawfully conspire with the said Thomas with intent unlawfully to seize, take, or possess the property of the United States in the Department of War with intent to violate or disregard the said act in the said seventh article referred to, or that he did then and there commit a high misdemeanor in office. Respondent, protesting that the said Stanton was not then and there Secretary for the Department of War, again refers to his former answers, in so far as they are applicable, to show the intent with which he proceeded in the premises, and prays equal benefit therefrom, as if the same were here again fully repeated. Respondent further takes exception to the sufficiency of the allegations of this article as to the conspiracy alleged upon the same grounds as stated in the exception set forth in his answer to said article fourth.

ART. VIII. The answer in full:

And for answer to the said eighth article this respondent denies that on the 21st day of February, 1868, at Washington aforesaid, or at any other time and place, he did issue and deliver to the said Thomas the said letter of authority set forth in the said eighth article, with the intent unlawfully to control the disbursements of the money appropriated for the military service and for the Department of War. This respondent, protesting that there was a vacancy in the office of Secretary for the Department of War, admits that he did issue the said letter of authority, and he denies that the same was with any unlawful intent whatever, either to violate the Constitution of the United States or any act of Congress. On the contrary, this respondent again affirms that his sole intent was to vindicate his authority as President of the United States, and by peaceful means to bring the question of the right of the said Stanton to continue to hold the said office of Secretary of War to a final decision before the Supreme Court

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of the United States, as has been hereinbefore set forth; and he prays the same benefit from his answer in the premises as if the same were here again repeated at length.

ART. IX. In answer to Article IX the President reviews his transactions and conversations with General Emory, admits that he expressed an opinion that the law in question was unconstitutional, shows that he expressed the same opinion to the House of Representatives by message, and summarizes:

Respondent doth therefore deny that by the expression of such opinion he did commit or was guilty of a high misdemeanor in office, and this respondent doth further say that the said article nine lays no foundation whatever for the conclusion stated in the said article, that the respondent, by reason of the allegations therein contained, was guilty of a high misdemeanor in office.

ART. X. In answer to this article the President does not admit that the passages set forth as portions of addresses delivered by him correctly or justly present his speeches, and demands that, in case the matter set forth in the article is deemed to constitute a high misdemeanor cognizable by the court, proof shall be required to be made of the actual speech. He protests that he has not been unmindful of the high duties of his office, or the harmonies and courtesies proper between different branches of the Government, or that he has had designs against the rightful power and authority of Congress; and that in all his communications to the Congress and the public he has acted within and according to his right and privilege as a citizen and his right and duty as President. And in conclusion he says:

And this respondent says that neither the said tenth article nor any specification thereof nor any allegation therein contained touches or relates to any official act or doing of this respondent in the office of President of the United States or in the discharge of any of its constitutional or legal duties or responsibilities; but said article and the specifications and allegations thereof, wholly and in every part thereof, question only the discretion or propriety of freedom of opinion or freedom of speech, as exercised by this respondent as a citizen of the United States in his personal right and capacity, and without allegation or imputation against this respondent of the violation of any law of the United States touching or relating to freedom of speech or its exercise by the citizens of the United States, or by this respondent as one of the said citizens or otherwise; and he denies that by reason of any matter in said article or its specifications alleged he has said or done anything indecent or unbecoming in the Chief Magistrate of the United States, or that he has brought the high office of the President of the United States into contempt, ridicule, or disgrace, or that he has committed or has been guilty of a high misdemeanor in office.

ART. XI. The President denies specifically the charges, standing upon his right to freedom of speech as set forth in the answer to the preceding article, and concludes:

And this respondent, further answering the said eleventh article, denies that by means or reason of anything in said article alleged this respondent, as President of the United States, did, on the 21st day of February, 1868, or at any other day or time, commit, or that he was guilty of, a high misdemeanor in office.

And this respondent, further answering the said eleventh article, says that the same and the matters therein contained do not charge or allege the commission of any act whatever by this respondent, in his office of President of the United States, nor the omission by this respondent of any act of official obligation or duty in his office of President of the United States; nor does the said article nor the matters therein contained name, designate, describe, or define any act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means whereby this respondent can know or understand what act or mode or form of attempt, device, contrivance, or means, or of attempt at device, contrivance, or means, are imputed to or charged against

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this respondent, in his office of President of the United States, or intended so to be, or whereby this respondent can more fully or definitely make answer unto the said article than he hereby does.

Having answered article by article, the answer concludes:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time, as may become necessary or proper, and when and as such necessity and propriety shall appear.

ANDREW JOHNSON.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

Attached to the answer were two exhibits, one being a message transmitted to the Senate by the President March 2, 1867, wherein the right of removal of officers was discussed; and the other a message of December 12, 1867, relating particularly to the case of Mr. Stanton.

2429. President Johnson's impeachment continued.

The answer of President Johnson to the articles of impeachment having been read, the question was taken on receiving it and placing it on file.

On the request of the managers the Senate ordered an attested copy of the answer of President Johnson to be sent to the House.

The answer of President Johnson having been received, the Senate gave the managers time to consult the House on a replication.

The reading of the answer being concluded, the Chief Justice said:[80]

Senators, you have heard the answer submitted by the counsel for the President of the United States. Those of you who are in favor of receiving and ordering this answer to be filed will say "aye," and those who are of the contrary opinion will say "no." [Having put the question.] It is so ordered; the answer is received and will be filed.

Thereupon Mr. Manager Boutwell presented a request that a copy of the answer be furnished to the House of Representatives. The Chief Justice put the question on the motion suggested by the request of the managers, and it was agreed to, the formal order being:

Ordered, That the managers have time to consult the House of Representatives on a replication, and that they be furnished with a copy of the answer of the respondent; and

Ordered, That the Secretary communicate to the House of Representatives an attested copy of the answer of the President to the articles of impeachment, together with a copy of the foregoing order.

2430. President Johnson's impeachment continued.

The answer to President Johnson having been read, his counsel offered a paper, signed by themselves, asking thirty days to prepare for trial.

The managers contended that President Johnson's request for time to prepare for the trial should have been signed by himself and under oath.

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[80] Senate Journal, p. 860; Globe supplement, pp. 22, 23.

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The managers opposed President Johnson's request for thirty days to prepare for trial, citing American and English precedents in argument.

The Senate granted to President Johnson a less time than his counsel asked to prepare for trial.

In granting to President Johnson time to prepare for trial the Senate intimated that there should be no delays after the beginning of the trial.

The Senate retired to consider President Johnson's application for time to prepare for trial.

The proceedings in the Senate consultation chamber during the Johnson trial appear in the Journal and Globe; but the debates are not given. (Footnote.)

Thereupon Mr. Evarts, in behalf of the respondent, submitted the following motion: [81]

To the Senate of the United States sitting as a court of impeachment:

And now, on this 23d day of March, in the year 1868, the counsel for the President of the United States, upon reading and filing his answer to the articles of impeachment exhibited against him, respectfully represent to this honorable court that after the replication shall have been filed to the said answer, the due and proper preparation of and for the trial of the cause will require, in the opinion and judgment of such counsel, that a period of not less than thirty days should be allowed to the President of the United States and his counsel for such preparation, and before the said trial should proceed.

HENRY STANBERY,
B. R. CURTIS,
THOMAS A. R. NELSON,
WILLIAM M. EVARTS,
W. S. GROESBECK,
Of Counsel.

Mr. Manager Logan, on behalf of the House of Representatives, opposed the motion on the ground that the reasons given were not sufficient, and that the trial should be hastened because the respondent was continuing daily in the misuse of power for which he was arraigned. As to the precedents he said:

In the many trials we have reported in this and other countries this application has no precedent.

In the case of Judge Chase his application stated, in substance, that it was not in his power to obtain information respecting facts, alleged against him to have taken place in Philadelphia and Richmond, in time to prepare and put in his answer and proceed to trial before the 5th day of March then next following; and further that he could not get his witnesses or counsel nor prepare his answer, at the same time disclaiming that this was done for delay. This application was sworn to by the respondent; he was given time, and the facts show that his answer was filed and his trial had, and he acquitted in five days' less time than he swore it would take him to prepare for trial.

In Judge Peck's case his application stated his difficulties in obtaining witnesses, the distance they lived from Washington, the time it would require them to travel from St. Louis to Washington, the necessity for copying and obtaining records; that four years had elapsed since the transpiring of the acts complained of against him. This application was also sworn to. If the learned counsel remember the trial of Queen Caroline before the Parliament of Great Britain, when time was granted for the procurement of evidence the learned attorney-general then and there protested against this granting of time becoming a precedent for any future trial, this application being granted merely through courtesy to the Queen, when witnesses were deemed absolutely necessary to protect, if possible, her reputation. This application differs in form and substance from any that our attention has been directed to, made by the counsel, signed by themselves, and sworn to by no one.

[81] Senate Journal, pp. 860, 861; Globe supplement, pp. 23–28.

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Mr. Logan in conclusion said:

I presume no man will doubt that if an application of this kind were made to a court at law the inquiry would be: "Have you issued your subpoenas; have you attempted to get your witnesses; have you attempted to make any preparation to try the cause?" And if the counsel would answer that they had made no preparation whatever; that they had issued no subpoenas; had made no attempt to procure witnesses or get ready for the trial of the cause, but merely desired time for thought and reflection, the application would certainly be denied. And against the granting of this, not made upon the oath of any person, not signed by the President, and merely intended for the benefit of counsel, we, the managers, in the name of the House of Representatives and the whole people of this Republic do most solemnly protest.

Later Mr. Manager Bingham urged:

I submit that a question of this magnitude has never been decided upon a mere presentation of a statement of counsel, in this country or in any country. To speak more plainly, a motion for continuance arising on a question of this sort, I venture to say, has never been decided affirmatively upon such an issue on a mere statement of counsel. If Andrew Johnson, the accused at this bar, has witnesses that were not within the process of this court up to this day, but whose attendance he can hope to procure if time be allowed him, he can make affidavit before this tribunal that they are material and set forth in his affidavit what he expects to prove by them. I concede that upon such a showing there would be something upon which the Senate might properly act.

Mr. Evarts, of counsel for the respondent, said:

In our estimate of the course of this proceeding before this honorable court we have not yet arrived at a time when it was the duty of counsel or was at the charge of the accused to know or consider what the issues were upon which he was to prepare on his side or expect on the other the production of proofs. Beyond that, we feel no occasion to present by affidavit to this honorable court a matter so completely within its cognizance that our time to plead was fixed so as to offer us but eight working days for that duty of counsel. * * *

It would seem to me that we are placed thus far in the attitude of a defendant in a civil or in a public prosecution who upon the issue joined desires time to prepare for trial. The ordinary course in such a case is that as matter of right, as matter of absolute and universal custom, one is not required or expected to give any cause of actual obstruction and difficulty in reference to a continuance to what is the term of the court, doubtless in most cases to occur within a brief period after the issue is joined. This court having no such arrangement and no such possible arrangement of its affairs in advance, we are obliged at each stage of regular proceeding to ask your attention as to what you will provide and consider in the particular case is, according to the general nature of the procedure and the understood attitude of both parties to it, a just and reasonable proposition to be made by us as to the time that should be allowed for the preparation in all respects for this trial after the issue shall have been joined.

At the conclusion of the discussion between the managers and the counsel for the respondent Mr. John B. Henderson, a Senator from Missouri, moved that the application of counsel for the respondent be postponed until after the filing of the replication. This motion was disagreed to, yeas 25, nays 28.

The question then recurring on granting the application of counsel for the respondent, it was denied, yeas 12, nays 41.

Thereupon Mr. Evarts, counsel for the respondent, submitted the following:

The counsel for the President now move that there be allowed for the preparation of the President of the United States for the trial, after the replication shall be filed and before the trial shall be required to proceed, such reasonable time as shall now be fixed by the Senate.

Pending its consideration the Senate adjourned until the next day, March 24. When it convened on that day [82] for the trial the replication

[82] Senate Journal, pp. 862–864; Globe supplement, pp. 28, 29.

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of the House of Representatives was filed, and then the consideration of the application for time was resumed. In answer to the request of counsel for the respondent, Mr. Reverdy Johnson, of Maryland, a Senator, proposed the following:

Ordered, That the Senate proceed to the trial of the President under the articles of impeachment exhibited against him at the expiration of ten days from this day, unless for causes shown to the contrary.

To this Mr. Charles Sumner, of Massachusetts, a Senator, proposed an amendment, which he subsequently withdrew, striking out all after the word ordered and inserting:

Now the replication has been filed, the Senate, adhering to its rule already adopted, will proceed with the trial from day to day (Sundays excepted) unless otherwise ordered on reason shown.

Pending consideration, the Senate voted, yeas 29, nays 23, to retire for consultation,[83] and being called to order in their conference chamber, Mr. Johnson modified his order to read as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Thursday, the 2d of April.

On motion of Mr. Sumner, and by a vote of yeas 28, nays 24, this order was amended by striking out "Thursday, the 2d of April," and inserting "Monday, the 30th of March instant."

A proposition to suspend consideration of the subject until the managers had opened their case and submitted their evidence, was presented by Mr. George H. Williams, of Oregon, but was disagreed to, yeas 9, nays 42.

On motion of Mr. Thomas A. Hendricks, of Indiana, and without division, the order proposed by Mr. Johnson was further amended by adding the words—

and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

The order as amended was then agreed to; and the Senate having returned to their Chamber, the Chief Justice informed the counsel for the respondent that the Senate had agreed upon an order in response to their application, as follows:

Ordered, That the Senate will commence the trial of the President upon the articles of impeachment exhibited against him on Monday, the 30th of March instant, and proceed therein with all convenient dispatch, under the rules of the Senate sitting upon the trial of an impeachment.

2431. President Johnson's impeachment continued.

The form of President Johnson's answer was commented on during preparation of the replication in the House.

Argument as to whether or not a demurrer is permissible in an impeachment case.

Comment on the use of the phrase "all the people" in the pleadings in an impeachment case.

Form of resolutions adopting the replication in the Johnson trial and directing its presentation in the Senate.

In the House, on March 23,[84] Mr. George S. Boutwell, of Massachusetts, from the managers, reported a form of replication. In reporting it he said:

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[83] The proceedings in the consultation chamber appear both in the Journal and Globe. (Globe Journal, p. 863; Globe supplement, p. 28.)

[84] House Journal, pp. 564, 566; Globe, pp. 2073–2075, 2078–2081.

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The attention of the managers was called to the peculiar form of the answer filed by the President. To most of the articles, however, he makes answer, in substance, that he is not guilty, although the form of the answer is different from that which has generally been employed in similar cases. In respect to some of the articles the answer probably amounts to a demurrer merely. But upon the whole the managers have chosen to treat the answer of the President to each and every article as a plea of the general issue of not guilty. And the managers are of opinion that no advantage can be taken, as against the House of Representatives, from the form of replication which has been reported by the managers.

Mr. George W. Woodward, of Pennsylvania, criticising the demurrer, said:

If I understood the answer of the President to the eleventh article of impeachment, it amounts to a demurrer to that article. It denies that there is any impeachable offense charged in the eleventh article. My own private opinion is that the demurrer or answer is very conclusive. I do not think there is any impeachable offense charged in the eleventh article.

The answer of the President putting that point in issue, which is a legal question and amounts to a demurrer, there should be a special replication to that part of the answer which relates to the eleventh article, or a formal rejoinder in demurrer. This general replication does not join an issue upon that article at all; it is what might be called a departure in pleading. Here is a demurrer to the eleventh article which denies that any impeachable offense is charged in it. The managers do not aver in the replication that the eleventh article charges any impeachable offense, and therefore there is no issue upon the record upon that article.

To this Mr. John A. Bingham, of Ohio, replied:

Now, as to the answer of the President, I beg leave to call the attention of the House and the attention of the gentleman from Pennsylvania [Mr. Woodward] to the fact that while it does contain much that is argumentative, much that may be called demurrer, which is never allowed at all in an impeachment case, which was never introduced into the proceedings of an impeachment case—for there never was a demurrer entertained by the Senate in an impeachment case, none ever entertained in the House of Lords of England; there is no such note of record; it does not lie; special pleading is unknown to the whole proceeding—yet this answer of the President to the eleventh article of impeachment, in its last clause, does expressly deny, and is therefore simply a plea of not guilty—it expressly denies that he committed a crime. As to form, it is nothing; substance is everything.

Mr. Fernando Wood, of New York, objected to the language of the replication, in that it professed to reply in the name of all the people of the United States; but Mr. Benjamin F. Butler, of Massachusetts, replied that this form, using the words "all the people" had been in use five hundred years, and had been questioned only once, in the days of Charles I.

The replication was agreed to on March 24 by a vote of yeas 116, nays 36, whereby the House—

Resolved, That the House hereby adopts the replication to the answer of the President, as now submitted by the managers.

Thereupon, on motion of Mr. Boutwell, the following was agreed to:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of the President of the United States on the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

2432. President Johnson's impeachment continued.

The replication of the House to President Johnson's answer to the articles of impeachment.

The replication in the Johnson trial was signed by the Speaker and attested by the Clerk.

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The Senate ordered that an authenticated copy of the replication to President Johnson's answer be furnished to counsel of the respondent.

On March 24 [85] in the Senate sitting for the trial, the message authorized by the resolution was received, and immediately upon its being laid before the Senate, Mr. Manager Boutwell presented the replication:

IN THE HOUSE OF REPRESENTATIVES,
UNITED STATES, *March 24, 1868.*

Replication by the House of Representatives of the United States to the answer of Andrew Johnson, President of the United States, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Andrew Johnson, President of the United States, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency of his answer to each and all of the several articles of impeachment exhibited against said Andrew Johnson, President of the United States, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against said Andrew Johnson in the said articles of impeachment, or either of them; and for replication to said answer do say that said Andrew Johnson, President of the United States, is guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

SCHUYLER COLFAX,
Speaker of the House of Representatives.
EDWARD MCPHERSON,
Clerk of the House of Representatives.

Thereupon, on motion of Mr. Reverdy Johnson, of Maryland, a Senator, it was:

Ordered, That the Secretary of the Senate be directed to furnish the counsel of the President an authenticated copy of the replication of the House of Representatives to the answer of the President to the articles of impeachment exhibited against him by the House of Representatives.

2433. President Johnson's impeachment continued.

The opening addresses of managers and counsel in the Johnson trial.

The opening addresses in the Johnson trial discussed constitutional questions and outlined evidence.

Definition of impeachable offenses by counsel for President Johnson.

By consent the managers in the Johnson trial reserved the right to supply omissions in evidence after they had closed their testimony.

On motion of counsel for President Johnson, the Senate adjourned over to permit time for preparation of testimony for the defense.

On March 30,[86] the day set for the commencement of the trial, the Senate assembled and the proceedings began with the usual proclamation and ceremonies. The journal having been read, the Chief Justice said:

Gentlemen, managers of the House of Representatives, you will now proceed in support of the articles of impeachment.

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[85] Senate Journal, p. 862; Globe supplement, p. 28.
[86] Senate Journal, p. 865; Globe supplement, pp. 29–53.

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Mr. Manager Benjamin F. Butler then opened the case for the managers, speaking nearly three hours, and touching on the following topics: (*a*) What are impeachable offenses, antagonizing the view that only indictable offenses are impeachable; (*b*) whether or not the Senate sat as a court, taking the view that it did not; (*c*) and a review of the issues presented by the articles and the reply, with arguments in support of the articles. Mr. Butler also presented a brief of the authorities upon the law and impeachable crimes and misdemeanors, prepared by Mr. William Lawrence, of Ohio, and revised by himself.[87]

Then the managers proceeded with the testimony, Mr. Manager James F. Wilson proceeding first with certain documentary evidence. The presentation of testimony, documentary and oral, continued until Saturday, April 4,[88] when it was announced on behalf of the managers that the case on behalf of the House of Representatives was substantially closed, but that in looking over their testimony they might find some omissions which they might wish to supply, and therefore they did not wish to be precluded from offering them. The counsel for the President announced that they took no exception to this reservation.

Thereupon Mr. Benjamin R. Curtis, of Massachusetts, of counsel for the President, announced that they desired time for preparation of their testimony, and therefore he would move that "when this court adjourns, it adjourn to Thursday next." [89]

Thereupon Mr. John Conness, a Senator from California, moved that the Senate sitting for the trial should adjourn until Wednesday. Mr. Reverdy Johnson, a Senator from Maryland, moved an amendment substituting Thursday for Wednesday, and it was agreed to, yeas 37, nays 10. Then the motion as amended was agreed to.

At the reconvening on April 9, the managers occupied a brief time in presenting additional evidence, after which Mr. Benj. R. Curtis, of counsel for the President, opened the defense, speaking the remainder of this day and concluding on April 10.[90] He first reviewed the issues presented by the articles and the answer, and then argued (*a*) that impeachable offenses were "only high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done;" and (*b*) that the Senate, in trying an impeachment, was a court.

At the conclusion of Mr. Curtis's opening the presentation of testimony on behalf of the respondent was begun, and proceeded from day to day until April 18,[91] when Mr. William M. Evarts, of counsel, announced that the defense had concluded its testimony, but would reserve the privilege to offer proof that might have been overlooked because of the illness of Mr. Stanberry, to whom had been intrusted the examination of witnesses.

2434. President Johnson's impeachment continued.

The order of the final arguments in the trial of President Johnson.

Disorder occurring in the galleries during the Johnson trial, they were cleared.

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[87] Globe supplement, pp. 41–50.
[88] Senate Journal, pp. 882, 883; Globe supplement, p. 121.
[89] It will be observed that this was merely an adjournment of the Senate sitting for the trial and therefore not governed by the rule of the Constitution. The Senate itself in its legislative capacity was in session during intervening days.
[90] Senate Journal, p. 885; Globe supplement, pp. 123–136.
[91] Senate Journal, p. 914; Globe supplement, p. 238.

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On April 20[92] the managers introduced certain verbal and documentary evidence, after which, on April 23, the Senate, after consideration, agreed to[93] the following:

Ordered, That as many of the managers as desire to do so be permitted to file arguments or to address the Senate orally; but the conclusion of the oral argument shall be by one manager, as provided in the twenty-first rule.

Thereupon Mr. John A. Logan, on behalf of the managers, and in accordance with the above rule, filed an argument.[94] On the same day Mr. Manager George S. Boutwell began an oral argument, which he concluded on the succeeding day.[95] Thereupon Mr. Thomas A. R. Nelson, of counsel for the respondent, began an argument in defense, which he concluded on the succeeding day, April 24.[96]

On April 25,[97] after the consideration of business relative to course of procedure in passing judgment, Mr. William S. Groesbeck, counsel for the President, continued argument for the defense, concluding on that day.

On Monday, April 27, Mr. Manager Thaddeus Stevens argued for the managers.[98] He was followed on the same day by Mr. Manager Thomas Williams, who concluded on the next day.[99]

At the conclusion of Mr. William's address, Mr. Manager Benjamin F. Butler asked and obtained leave of the Senate,[100] by unanimous consent, to make "a short narration of facts, made necessary by what fell from Mr. Nelson, of counsel for the President, in his speech of Friday last." Mr. Nelson, also by unanimous consent, was permitted to reply.

On April 28,[101] Mr. William M. Evarts, counsel for the respondent, then began argument for the defense, which he continued daily until May 1, when he concluded. On the same day Mr. Henry Stanbery began the concluding argument for the defense, finishing on May 2.[102]

On May 4, 5, and 6,[103] Mr. Manager John A. Bingham made the concluding argument for the managers.

At the conclusion of Mr. Bingham's address[104] there were in the gallery applause and hisses, whereupon, on motion of Mr. James W. Grimes, of Iowa, it was—

Ordered, That the Sergeant-at-Arms be directed to clear the galleries.

In obedience to this order the galleries were completely cleared. Later the galleries were ordered by the Senate to be reopened.

2435. President Johnson's impeachment continued.

Being excluded from the Johnson trial by a secret session, the House returned to its Hall and determined to attend again when informed that the Senate was ready to receive them.

Shortly after, on motion of Mr. George F. Edmunds, of Vermont, the doors of the Senate were closed for deliberation. The House of Representatives consequently returned to their Chamber,[105] and, the

[92] Senate Journal, p. 914; Globe supplement, p. 239.
[93] Senate Journal, p. 921; Globe supplement, p. 251.
[94] Journal, p. 921; Globe supplement, pp. 251–268.
[95] Journal, p. 921; Globe supplement, pp. 268–286.
[96] Journal, p. 922; Globe supplement, pp. 286–310.
[97] Senate Journal, p. 924; Globe supplement, pp. 310–320.
[98] Senate Journal, p. 925; Globe supplement, pp. 320–324.
[99] Senate Journal, pp. 925, 926; Globe supplement, pp. 324–335.
[100] Senate Journal, p. 926; Globe supplement, pp. 335, 336.
[101] Senate Journal, pp. 926–930; Globe supplement, pp. 337–368.
[102] Senate Journal, p. 930; Globe supplement, pp. 368–379.
[103] Senate Journal, pp. 931, 932; Globe supplement, pp. 379–406.
[104] Senate Journal, pp. 932, 933; Globe supplement, pp. 406, 407.
[105] House Journal, pp. 655, 656; Globe, pp. 2365, 2368.

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Speaker having resumed the chair, a question was raised as to the course of procedure.

The Speaker [106] had read the rule under which the House was acting:

Resolved, That on the days when the Senate shall sit for the trial of the President upon the articles of impeachment exhibited by the House of Representatives the House, in Committee of the Whole, will attend with the managers at the bar of the Senate at the hour named for the commencement of the proceedings.

and then ruled:

The Chair rules that under this resolution, the Senate having gone into secret session in their own Chamber for deliberation, and it being impossible for the managers and the House as in the Committee of the Whole to attend at the bar of the Senate, it is the duty of the House to return to its Hall, and here, as the House of Representatives, to transact business while waiting for any message from the Senate after the doors of that body have been reopened. * * * The Chair took some time to examine this resolution, and after consultation with others who are excellent parliamentarians he has no doubt of the fact in his own mind that while the Senate is engaged in secret deliberation for one or four and twenty hours it could not be expected or required of the House to remain in the Senate corridors, and the Speaker, as representing the House, could not consent to it without the direct order of the House. The Chair therefore thinks, the order having been made before the House proceeded to the Senate, that when the House returns business should be transacted; and the Senate having excluded the House from its Chamber, as it has a right to do under its rules, the House must therefore return to the Hall and await a message from the Senate.

Thereupon the Speaker recognized Mr. Elihu B. Washburne, chairman of the Committee of the Whole, who reported:

The Committee of the Whole have, according to order, attended the managers to the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; and the argument having been closed and the Senate having ordered its doors to be shut for deliberation, the committee thereupon returned with the managers to the Hall of the House.

The Speaker appears to have sent a letter to the Senate asking that the House might be notified when the doors should be opened. This must have been done informally by the Speaker, but the Chief Justice laid it before the Senate, whereupon it was—[107]

Ordered, That the Secretary inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, will notify the House when it is ready to receive them at the bar.

2436. President Johnson's impeachment continued.

The Senate declined to make public its debates in secret session on the final judgment in the Johnson trial.

After the doors of the Senate had been closed, [108] it resumed consideration of this resolution, which had been proposed by George F. Edmunds, of Vermont, on April 24:

Ordered, That after the arguments shall be concluded, and when the doors shall be closed for deliberation upon the final question the official reporters of the Senate shall take down the debates upon the final question, to be reported in the proceedings.

This order, with pending amendments relating to restriction of debate, was laid on the table by a vote of 28 yeas, 20 nays.[109]

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[106] Schuyler Colfax, of Indiana, Speaker.
[107] Senate Journal, p. 933; Globe supplement, p. 408.
[108] Senate Journal, p. 933; Globe supplement, pp. 294, 407.
[109] While the debates were not taken down, a statement of what was done in the secret session appears in the Journal and Globe. (Senate Journal, pp. 933–940; Globe supplement, pp. 407–410.)

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2437. President Johnson's impeachment continued.

The Senate adopted an order governing its deliberation and voting on the final question in the Johnson trial.

Deliberation having been had in secret session, the Senate voted on the articles of impeachment without debate.

While the deliberations on the final question in the Johnson trial were secret, the Senators were permitted to file written opinions.

Thereupon the Senate proceeded to consider [110] a proposition originally submitted by Mr. Charles Sumner, of Massachusetts, on April 24:

Ordered, That the Senate, sitting for the trial of Andrew Johnson, President of the United States, will proceed to vote on the several articles of impeachment at 12 o'clock on the day after the close of the arguments.

After propositions to amend had been considered, the order was laid on the table, and then, after further consideration, the Senate, without division, agreed to the following, proposed by Mr. Justin S. Morrill, of Vermont:

Ordered, That when the Senate adjourns to-day, it adjourn to meet on Monday next, at 11 o'clock a.m., for the purpose of deliberation, under the rules of the Senate, sitting on the trial of impeachments, and that on Tuesday next following, at 12 o'clock m., the Senate shall proceed to vote without debate on the several articles of impeachment; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

2438. President Johnson's impeachment continued.

Having disagreed as to the form of final question in the Johnson trial, the Senate left it to the Chief Justice.

On May 7 [111] the Senate proceeded to the consideration of the form in which the question should be put, and various propositions were offered, as follows, for amendment to the rules:

By Mr. Charles Sumner, of Massachusetts:

Rule 23. In taking the votes of the Senate on the articles of impeachment, the Presiding Officer shall call each Senator by his name, and upon each article propose the following question, in the manner following: "Mr. ———, how say you, is the respondent, ———, guilty or not guilty, as charged in the ——— article of impeachment?" whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

At the suggestion of Mr. Roscoe Conkling, of New York, Mr. Sumner modified this by striking out the words "as charged in" and inserting "of a high crime or misdemeanor (as the case may be) within."

Mr. Charles R. Buckalew, of Pennsylvania, proposed to amend by changing the form of question to the following, which Mr. Sumner accepted:

Mr. ———, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime or misdemeanor (as the case may be) as charged in the article of impeachment?

Mr. John Conness, of California, proposed to amend by substituting for the latter portion of Mr. Sumner's proposition, the following:

Each of the articles Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, and 11 propose the following question in the manner following: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high

[110] Senate Journal, pp. 934–937; Globe supplement, pp. 408, 409.
[111] Senate Journal, pp. 937, 938; Globe supplement, p. 409.

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crime or misdemeanor as charged in this article? And upon each of the articles Nos. 4 and 6 he shall propose the following question: Mr. Senator, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high crime charged in this article? Whereupon each Senator shall rise in his place and answer "guilty" or "not guilty."

After voting on an amendment proposed by Mr. Thomas A. Hendricks, of Indiana, which provided for voting separately on the several clauses of the eleventh article, the whole subject was, on motion of Mr. Sumner, laid on the table by a vote of, yeas 24, nays 11.

Thereupon, and as appeared later, after an understanding that the Chief Justice should propose a rule, the Senate adjourned to Monday, May 11.

2439. President Johnson's impeachment continued.

Views of the Chief Justice on form of final question in the Johnson trial and on division of the articles for voting.

In the Johnson trial the Senate adopted the form of final question and method of voting suggested by the Chief Justice.

On May 11 [112] the Chief Justice presented the following views, which were ordered to be entered on the Journal:

Senators: In conformity with what seemed to be the general wish of the Senate when it adjourned last Thursday, the Chief Justice, in taking the vote on the articles of impeachment, will adopt the mode sanctioned by the practice in the cases of Chase, Peck, and Humphreys.

He will direct the Secretary to read the several articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase:

"Mr. Senator ————, how say you, is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?"

In putting the question on articles 4 and 6, each of which charges a crime, the word "crime" will be substituted for the word "misdemeanor."

The Chief Justice has carefully considered the suggestion of the Senator from Indiana [Mr. Hendricks], which appeared to meet the approval of the Senate, that in taking the vote on the eleventh article, the question should be put on each clause, and has found himself unable to divide the article as suggested. The article charges several facts, but they are so connected that they make but one allegation, and they are charged as constituting one misdemeanor.

The first fact charged is, in substance, that the President publicly declared in August, 1866, that the Thirty-ninth Congress was a Congress of only part of the States and not a constitutional Congress, intending thereby to deny its constitutional competency to enact laws or propose amendments of the Constitution; and this charge seems to have been made as introductory, and as qualifying that which follows, namely, that the President, in pursuance of this declaration, attempted to prevent the execution of the tenure of office act by contriving and attempting to contrive means to prevent Mr. Stanton from resuming the functions of Secretary of War after the refusal of the Senate to concur in his suspension, and also by contriving and attempting to contrive means to prevent the execution of the appropriation act of March 2, 1867, and also to prevent the execution of the rebel States governments act of the same date.

The gravamen of the article seems to be that the President attempted to defeat the execution of the tenure of office act, and that he did this in pursuance of a declaration which was intended to deny the constitutional competency of Congress to enact laws or propose constitutional amendments, and by contriving means to prevent Mr. Stanton from resuming his office of Secretary, and also to prevent the execution of the appropriation act and the rebel States governments act.

The single substantive matter charged is the attempt to prevent the execution of the tenure of office act; and the other facts are alleged either as introductory and exhibiting this general purpose, or as showing the means contrived in furtherance of that attempt.

[112] Senate Journal, pp. 938–940; Globe supplement, pp. 409, 410.

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This single matter, connected with the other matters previously and subsequently alleged, is charged as the high misdemeanor of which the President is alleged to have been guilty.

The general question, guilty or not guilty of a high misdemeanor as charged, seems fully to cover the whole charge, and will be put as to this article as well as to the others, unless the Senate direct some mode of division.

In the tenth article the division suggested by the Senator from New York [Mr. Conkling] may be more easily made. It contains a general allegation, to the effect that on the 18th of August, and on other days, the President, with intent to set aside the rightful authority of Congress and bring it into contempt, delivered certain scandalous harangues, and therein uttered loud threats and bitter menaces against Congress and the laws of the United States enacted by Congress, thereby bringing the office of President into disgrace, to the great scandal of all good citizens, and sets forth, in three distinct specifications, the harangues, threats, and menaces complained of.

In respect to this article, if the Senate sees fit so to direct, the question of guilty or not guilty of the facts charged may be taken in respect to the several specifications, and the question of guilty or not guilty of a high misdemeanor, as charged in the article, can also be taken.

The Chief Justice, however, sees no objection to putting the general question on this article in the same manner as on the others; for, whether the particular questions be put on the specifications or not, the answer to the final question must be determined by the judgment of the Senate, whether or not the facts alleged in the specifications have been sufficiently proved, and whether, if sufficiently proved, they amount to a high misdemeanor within the meaning of the Constitution.

On the whole, therefore, the Chief Justice thinks that the better practice will be to put the general question on each article without attempting to make any subdivision, and will pursue this course if no objective is made. He will, however, be pleased to conform to such directions as the Senate may see fit to give in this respect.

On motion of Mr. Charles Sumner, of Massachusetts, it was

Ordered, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer "guilty" or "not guilty" only.

2440. President Johnson's impeachment continued.

Form of voting in the Senate on the final question in the trial of President Johnson.

In the Johnson trial the Senate voted on the articles in an order different from the numerial order.

By direction of the Senate the Chief Justice announced the result after the vote on each article in the Johnson trial.

The House in Committee of the Whole attended in the Senate during the voting on the final question in the Johnson trial.

On May 12,[113] the day set for voting on the articles of impeachment, the illness of a Senator caused the voting to be postponed to May 16. On that day the Chief Justice took his seat at the hour of 12 o'clock, the usual proclamation was made by the Sergeant-at-Arms, etc., and then, on motion of Mr. George F. Edmunds, of Vermont, it was—

Ordered. That the Secretary be directed to inform the House of Representatives that the Senate, sitting for the trial of the President upon articles of impeachment, is now ready to receive them in the Senate Chamber.

Soon thereafter the Sergeant-at-Arms announced the presence of the House of Representatives at the bar, and the Members of the House of Representatives, as in Committee of the Whole, preceded by Mr. E. B. Washburne, chairman of that committee, and accompanied

[113] Senate Journal, pp. 941, 942; Globe supplement, p. 411.

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by the Speaker and Clerk, appeared and were conducted to the seats provided for them.

Thereupon, by a vote of yeas 34, nays 19, the Senate agreed to the following order; offered by Mr. George H. Williams, of Oregon:

Ordered, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand.

Then, on motion of Mr. Edmunds, it was [114]—

Ordered, That the Senate now proceed to vote upon the articles, according to the rules of the Senate.

Thereupon the Chief Justice directed the reading of the eleventh article, which being done, the following procedure occurred:

The CHIEF JUSTICE. Call the roll.

The Chief Clerk called the name of Mr. Anthony.

Mr. Anthony rose in his place.

The CHIEF JUSTICE. Mr. Senator Anthony, how say you? Is the respondent, Andrew Johnson, President of the United States, guilty or not guilty of a high misdemeanor, as charged in this article?

Mr. ANTHONY. Guilty.

[This form was continued in regard to each Senator as the roll was called alphabetically, each rising in his place as his name was called and answering "guilty" or "not guilty." When the name of Mr. Grimes was called, he being very feeble, the Chief Justice said he might remain seated. He, however, with the assistance of friends, rose and answered. The Chief Justice also suggested to Mr. Howard that he might answer in his seat, but he preferred to rise.]

The Chief Justice did not vote.

Immediately upon the vote being completed, a motion for a recess was made and disagreed to, whereupon a motion was made to adjourn. Mr. Reverdy Johnson, of Maryland, asked if it was in order for the Senate to adjourn while pronouncing judgment.

The Chief Justice said:

The precedents seem to be, except in one case, and that is the case of Humphreys, that the anouncement be not made by the presiding officer until after the vote has been taken on all the articles. The Chair will, however, take the direction of the Senate. If they desire the announcement of the vote which has been taken to be now made he will make it.

It being the general opinion of the Senate that the announcement be made, the Chief Justice said:

Upon this article thirty-five Senators vote "guilty," and nineteen Senators vote "not guilty." Two-thirds not having pronounced guilty, the President is, therefore, acquitted upon this article.

2441. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, decided that a motion to adjourn over was in order during the voting on the articles in the Johnson trial.

After voting on one article in the Johnson trial, the Senate adjourned to a day fixed.

Thereupon the question recurred on the motion, made by Mr. George H. Williams, of Oregon, that the Senate adjourn until Tuesday, the 26th instant.

[114] Senate Journal, pp. 942–945; Globe supplement, p. 411.

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Mr. Thomas A. Hendricks, of Indiana, made the point of order that as the Senate was engaged in executing an order, any motion except the simple motion to adjourn was not in order.

The Chief Justice ruled [115]—

A motion that when the Senate adjourns it adjourn to meet at a certain day could not now be entertained, because the Senate is in process of executing an order. A motion to adjourn to a certain day seems to the Chair to come under the same rule. He will, therefore, decide the motion not to be in order.

Mr. John Conness, of California, having appealed, the decision of the Chair was overruled, yeas 24, nays 30.[116]

Thereupon the question recurred on the motion of Mr. Williams, which was agreed to, yeas 32, nays 21, after several amendments proposing a different day had been disagreed to.

2442. President Johnson's impeachment continued.

The Senate, overruling the Chief Justice, held in order a motion to rescind its rule governing the voting on the articles of impeachment in the Johnson trial.

The Senate rescinded its order prescribing the method of voting on the articles in the Johnson trial, although it was partially executed.

On May 26,[117] after the Senate had assembled in the usual form, and after the House of Representatives, informed by message, had attended, Mr. George H. Williams, of Oregon, offered the following:

Resolved, That the resolution heretofore adopted as to the order of reading and voting upon the articles of impeachment be rescinded.

Mr. Charles R. Buckalew, of Pennsylanvia, having objected, the Chief Justice held:

The Chief Justice is under the impression that it changes the rule, and he will state the case to the Senate, in order that the Senate may correct him if he is wrong. The twenty-second rule of the Senate provides that—

"On the final question, whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately."

That necessarily implies that they be taken in their order unless it is otherwise prescribed by the Senate. Subsequently the framing of a question to be addressed to the Senators was left to the Chief Justice, and he stated the views which seemed to him proper to be observed. In the course of that statement he said that "he will direct the Secretary to read the articles successively, and after the reading of each article will put the question of guilty or not guilty to each Senator, rising in his place, in the form used in the case of Judge Chase," and then stated the form.

After the statement was made—

"Mr. Sumner submitted the following order; which was considered by unanimous consent, and agreed to:

"*Ordered*, That the questions be put as proposed by the presiding officer of the Senate, and each Senator shall rise in his place and answer guilty or not guilty, only."

That was the order under which the Senate was acting until on the 16th day of May the Senate adopted the following order moved by the Senator from Oregon [Mr. Williams]:

"*Ordered*, That the Chief Justice, in directing the Secretary to read the several articles of impeachment, shall direct him to read the eleventh article first, and the question shall then be taken on that article, and thereafter the other ten successively as they stand."

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[115] Globe supplement, p. 412.

[116] On May 26, on the same question, the Chief Justice decided as he had first decided, and was again overruled, 35 to 18. (Globe supplement, p. 414.)

[117] Senate Journal, p. 946; Globe supplement, p. 418.

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This order changing the rule was in order on the 16th of May, having been voted some days before. Subsequently, after the House had been notified that the Senate was ready to receive them, the Senator from Vermont [Mr. Edmunds] moved—

"That the Senate do now proceed to vote upon the articles according to the order of the Senate just adopted."

The Senate proceeded to vote upon the eleventh article, and after that adjourned until to-day. The present motion is to change the whole of these orders, for changing only the order of the 16th will not reach the effect intended. It must change, also, the order adopted on the motion of the Senator from Massachusetts [Mr. Sumner], and also, as the Chief Justice conceives, the rule. He is of opinion, therefore, that a single objection will take it over this day, but will submit the question directly to the Senate without undertaking to decide it, as it is a matter which relates especially to the present order of business.

The Senate, by a vote of yeas 29, nays 25, decided that the motion was in order. A second point of order, made by Mr. Lyman Trumbull, of Illinois, that an order partially executed might not be rescinded, was also overruled, yeas 24, nays 30.

After propositions to amend and to adjourn had been disagreed to, the motion of Mr. Williams was agreed to.

2443. President Johnson's impeachment continued.

Having voted no on three of the eleven articles, the Senate sitting for the trial of President Johnson adjourned without day.

Before announcing the adjournment voted by the Senate, the Chief Justice directed the Clerk to enter a judgment of acquittal of President Johnson.

Form of acquittal entered in the Journal of the trial of President Johnson.

The acquittal of President Johnson was announced in the House through the report of the chairman of the Committee of the Whole.

Thereupon, on motion of Mr. Williams, the Senate decided to proceed to vote on the second article of impeachment.[118] And the second article having been read, the question was put in the prescribed form, and the Chief Justice announced:

Thirty-five Senators have pronounced the respondent, Andrew Johnson, President of the United States, guilty; nineteen have pronounced him not guilty. Two-thirds not having pronounced him guilty, he stands acquitted upon this article.

In a similar manner the Senate determined to vote on the third article, and the vote having been taken, and having resulted 35 guilty and 19 not guilty, the acquittal was pronounced as before.

Thereupon Mr. Williams moved—

That the Senate, sitting for the trial of the President upon the articles of impeachment, do now adjourn without day.[119]

And there appeared yeas 34, nays 4.

Before announcing the result the Chief Justice said:

The Chief Justice begs leave to remind the Senate that the twenty-second rule provides that "if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered." * * * The Clerk will enter, if there be no objection, a judgment according to the rules—a judgment of acquittal.

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[118] Senate Journal, pp. 948, 950; Globe supplement, pp. 414, 415.
[119] Senate Journal, pp. 950, 951; Globe supplement, p. 415.

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And the Journal has this entry:

The Senate having tried Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained in the second, third, and eleventh articles of impeachment, it is therefore

Ordered and adjudged, That the said Andrew Johnson, President of the United States, be, and he is, acquitted of the charges in said articles made and set forth.

The Chief Justice then announced the vote on the motion of Mr. Williams to be yeas 34, nays 16; and thereupon declared the Senate, sitting as a court of impeachment for the trial of Andrew Johnson, President of the United States, upon articles of impeachment exhibited against him by the House of Representatives, adjourned without day.

After this adjournment the House of Representatives returned to their Hall, and the Speaker having resumed the chair, Mr. Washburne, of Illinois, made the following report:

The Committee of the Whole have, according to order, attended the managers of the bar of the Senate, sitting as a court of impeachment for the trial of Andrew Johnson; that the respondent has been declared to be acquitted on the second and third articles severally preferred by the House; and that then, without action on the other articles, the Senate, sitting as a court of impeachment, adjourned sine die.[120]

[120] House Journal, p. 735; Globe, p. 2587.

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The Impeachment and Trial of William W. Belknap*

1. Proceedings resulting from developments of a general investigation. Section 2444.
2. Impeachment of an officer after his resignation. Section 2445.
3. Presentation of impeachment at bar of Senate. Section 2446.
4. Drawing the articles and choosing the managers. Sections 2447, 2448.
5. The articles presented in the Senate. Section 2449.
6. Organization of the Senate for the trial. Section 2450.
7. Summons issued. Section 2451.
8. Appearance and answer of respondent. Sections 2452, 2453.
9. Replication of the House. Section 2454.
10. Rejoinder, surrejoinder, and similiter. Section 2455.
11. A question of delay. Section 2456.
12. Arguments and decision on plea to jurisdiction. Sections 2457–2459.
13. Respondent declines to answer on merits and protests. Sections 2460, 2461.
14. The trial proceeds. Sections 2462–2464.
15. Final arguments. Section 2465.
16. Decision of the Senate. Sections 2466, 2467.
17. Report of managers to the House. Section 2468.

2444. The impeachment and trial of William W. Belknap, late Secretary of War.

The impeachment of Secretary Belknap was set in motion through the findings of a committee empowered to investigate generally.

Form of resolution authorizing a general investigation of the Departments of the Government in 1876.

A committee empowered to investigate generally reported a resolution for the impeachment of Secretary Belknap.

The committee reported a resolution for the impeachment of Secretary Belknap, although they had been informed of his resignation of the office.

The work of drawing up the articles impeaching Secretary Belknap was referred to the Judiciary Committee.

On January 14, 1876,[1] Mr. William R. Morrison, of Illinois, from the Committee on Ways and Means, reported the following resolution in lieu of several resolutions which had been referred to the said committee:

Resolved, That the several committees of this House having in charge matters pertaining to appropriations, foreign affairs, Indian affairs, military affairs, naval affairs, post-office and post-roads, public lands, public buildings and grounds, claims, and war claims be, and they are hereby, instructed to inquire, so far as

*Hinds' Precedents, vol. 3, p. 902 (1907).
[1] First session Forty-fourth Congress, House Journal, pp. 183, 184; Record, p. 414.

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the same may properly be before their respective committees, into any errors, abuses, or frauds that may exist in the administration and execution of existing laws affecting said branches of the public service, with a view to ascertain what change and reformation can be made so as to promote integrity, economy, and efficiency therein; that the Committees on Expenditures in the State Department, in the Treasury Department, in the War Department, in the Navy Department, in the Post-Office Department, in the Interior Department, in the Department of Justice, and on Public Buildings be, and they are hereby, instructed to proceed at once, as required by the rules of the House, to examine into the state of the accounts and expenditures of the respective Departments submitted to them, and to examine and report particularly whether the expenditures of the respective Departments are justified by law; whether the claims from time to time satisfied and discharged by the respective Departments are supported by sufficient vouchers, establishing their justness both as to their character and amount; whether such claims have been discharged out of funds appropriated therefor, and whether all moneys have been disbursed in conformity with appropriation laws; whether any, and what, provisions are necessary to be adopted to provide more perfectly for the proper application of the public moneys and to secure the Government from demands unjust in their character or extravagant in their amount; whether any, and what, retrenchment can be made in the expenditures of the several Departments without detriment to the public service; whether any, and what, abuses at any time exist in the failure to enforce the payment of moneys which may be due to the United States from public defaulters or others, and to report from time to time such provisions and arrangements as may be necessary to add to the economy of the several Departments and the accountability of their officers; whether any offices belonging to the branches or Departments, respectively, concerning whose expenditures it is their duty to inquire, have become useless or unnecessary; and to report from time to time on the expediency of modifying or abolishing the same; also to examine into the pay and emoluments of all officers under the laws of the United States and to report from time to time such a reduction or increase thereof as a just economy and the public service may require. And for the purpose of enabling the several committees to fully comprehend the workings of the various branches or Departments of Government, respectively, the investigations of said committees may cover such period in the past as each of said committees may deem necessary for its own guidance or information or for the protection of the public interests in the exposing of frauds or abuses of any kind that may exist in said Departments: and said committees are authorized to send for persons and papers, and may report by bill or otherwise.

Resolved further, That the Committee on Public Expenditures be instructed to investigate and inquire into all matters set forth in the foregoing resolutions in the legislative departments of the Government, except in so far as the Senate is exclusively concerned, particularly in reference to the public printing and binding, and shall have the same authority that is conferred upon the other committees aforesaid.

This resolution, under the operation of the previous question, was agreed to without debate or division.

On March 2,[2] Mr. Hiester Clymer, of Pennsylvania, chairman of the Committee on Expenditures in the War Department, presented the following as the unanimous report of that committee:

That they found at the very threshold of their investigation such unquestioned evidence of the malfeasance in office by Gen. William W. Belknap, then Secretary of War, that they find it to be their duty to lay the same before the House.

They further report that this day at 11 o'clock a.m. a letter of the President of the United States was presented to the committee accepting the resignation of the Secretary of War, which is hereto attached, together with a copy of his letter of resignation, which the President informs the committee was accepted about 10 o'clock and 20 minutes this morning. They therefore unanimously report and demand that the said William W. Belknap, late Secretary of War, be dealt with according to the laws of the land, and to that end submit herewith the testimony in the case taken, together with the several statements and exhibits thereto attached, and also a rescript of the proceedings of the committee had during the

[2] House Journal, p. 496; Record, pp. 1426–1433.

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investigation of this subject. And they submit the following resolutions, which they recommend shall be adopted:

"*Resolved*, That William W. Belknap, late Secretary of War, be impeached of high crimes and misdemeanors while in office.

"*Resolved*, That the testimony in the case of William W. Belknap, late Secretary of War, be referred to the Committee on the Judiciary, with instructions to prepare and report without unnecessary delay suitable articles of impeachment of said William W. Belknap, late Secretary of War.

"*Resolved*, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they deem appropriate."

2445. Belknap's impeachment continued.

The committee which ascertained questionable facts concerning the conduct of Secretary Belknap gave him opportunity to explain, present witnesses, and cross-examine witnesses.

The House, after a review of English precedents, determined to impeach Secretary Belknap, although he had resigned.

The impeachment of Secretary Belknap was carried to the Senate by a committee of five.

The minority party were represented on the committee to carry the impeachment of Secretary Belknap to the Senate.

Appended to this report,[8] were extracts from the proceedings of the committee showing—

That the Secretary of War had been informed of the testimony, which was read to him in the committee room by the chairman; and that, on his request, he was permitted to employ counsel and cross-examine the witness;

That the committee also gave the Secretary of War permission to appear and make a sworn statement; but that he failed to appear; and

That the evidence against the Secretary of War consisted of the testimony of a single witness, Caleb P. Marsh, partially substantiated as to the charges against the Secretary by a copy of a certain contract between Marsh and one John S. Evans, and substantiated as to certain collateral matters by statements of other persons.

The question being on agreeing to the resolutions accompanying the report, a brief discussion arose. Mr. George F. Hoar, of Massachusetts, objected that impeachment should not be voted so hastily when they were confronted with the important question whether or not an officer could be impeached after resignation. The cases of Warren Hastings and Lord Francis Bacon were hardly applicable, since in England any man might be impeached, while in America only civil officers were subject to that proceeding. Mr. Hoar also cited Story on the Constitution as taking the view that an officer might not be impeached after resignation. Mr. J. C. S. Blackburn, of Kentucky, contended, however, that such was not the import of Judge Story's words, and cited, besides the English cases, the Durell case in the Forty-third Congress as justifying the action proposed by the committee.

Debate having been closed by the previous question, the resolutions were agreed to without division.

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[8] See Record, p. 1426.

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And thereupon, under authority of the third resolution, the Speaker[4] appointed as a committee Messrs. Hiester Clymer, of Pennsylvania; William M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; Lyman K. Bass, of New York, and Lorenzo Danford, of Ohio.

These gentlemen were the members of the Committee on Expenditures in the War Department, and a portion of them represented the minority party in the House.

2446. Belknap's impeachment continued.

Ceremonies and forms of presenting the impeachment of Secretary Belknap at the bar of the Senate.

Having carried the impeachment of Secretary Belknap to the Senate, the committee returned and reported verbally to the House.

Forms of resolutions in the Senate providing for taking orders on the impeachment of Secretary Belknap.

The message informing the Senate that a committee would impeach Secretary Belknap at the bar of the Senate included the names of the committee.

On March 3,[5] in the Senate, the following message was received from the House of Representatives at 12 o'clock and 55 minutes p.m., by the hands of Mr. Green Adams, its Chief Clerk:

Mr. President, the House of Representatives has passed the following resolution:

"*Resolved*, That a committee of five Members of this House be appointed and instructed to proceed immediately to the bar of the Senate, and there impeach William W. Belknap, late Secretary of War, in the name of the House of Representatives and of all the people of the United States of America, of high crimes and misdemeanors while in office, and to inform that body that formal articles of impeachment will in due time be presented, and to request the Senate to take such order in the premises as they may deem appropriate."

And it has

"*Ordered*, That Messrs. Hiester Clymer, of Pennsylvania; W. M. Robbins, of North Carolina; J. C. S. Blackburn, of Kentucky; L. K. Bass, of New York, and Lorenzo Danford, of Ohio, be the committee aforesaid."

At 1 o'clock p.m. the Sergeant-at-Arms announced the committee from the House of Representatives, who appeared at the bar of the Senate.

The committee advanced to the area in front of the Chair, when Mr. Clymer said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and, in the name of the House of Representatives and of all the people of the United States of America, we do impeach William W. Belknap, late Secretary of War of the United States, of high crimes and misdemeanors while in office; and we further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him, and make good the same. And in their name we demand that the Senate shall take order for the appearance of the said William W. Belknap to answer said impeachment.

The PRESIDENT pro tempore.[6] Mr. Chairman and gentleman of the committee

The committee thereupon withdrew.

Thereupon Mr. George F. Edmunds, of Vermont, following the usual precedents, offered this order, which was agreed to:

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[4] Michael C. Kerr, of Indiana, Speaker.
[5] Senate Journal, pp. 271, 272; Record, p. 1436.
[6] Thomas W. Perry, of Michigan, President pro tempore.

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Ordered, That the message of the House of Representatives relating to the impeachment of William W. Belknap be referred to a select committee to consist of five Senators.

The President pro tempore, by authorization of the Senate, appointed the following committee: Messrs. George F. Edmunds, of Vermont; Roscoe Conkling, of New York; Frederick T. Frelinghuysen, of New Jersey; Allen G. Thurman, of Ohio, and John W. Stevenson, of Kentucky.

Meanwhile the committee on the part of the House had returned to the Hall of Representatives, and Mr. Clymer reported[7] verbally—

that, in obedience to the order of the House, the committee proceeded to the bar of the Senate and, in the name of this body and of all the people of the United States, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors in office, and demanded that the Senate shall take order to make him appear before that body and answer for the same, and stated that the House would in due time present articles of impeachment and make them good; to which the response was, "Order shall taken."

On March 6,[8] in the Senate, Mr. Edmunds reported from the select committee the following orders, which were agreed to without division:

Whereas the House of Representatives on the 3d day of March, 1876, by five of its Members, Messrs. Clymer, Robbins, Blackburn, Bass, and Danford, at the bar of the Senate, impeached William W. Belknap, late Secretary of War, of high crimes and misdemeanors, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him, and make good the same; and likewise demanded that the Senate take order for the appearance of the said William W. Belknap to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rules and orders in such cases provided, take proper order thereon (upon the presentation of articles of impeachment), of which due notice shall be given to the House of Representatives.

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

2447. Belknap's impeachment continued.

In the Belknap case the committee in drawing up articles needed certain special powers as to witnesses.

Discussion of the law giving immunity to witnesses testifying before committees of the House.

On March 8[9] Mr. J. Proctor Knott, of Kentucky, from the Committee on the Judiciary, who had been directed to report articles of impeachment on the evidence referred to them, submitted the following report:

The Committee on the Judiciary would respectfully report that, in pursuance of the instructions of the House, they have prepared articles of impeachment against William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, but that, since preparing the same, they have been informed and believe that Caleb P. Marsh, upon whose testimony before the Committee on Expenditures in the War Department, and referred to them by the House, said articles were framed, has gone beyond the jurisdiction of the Government of the United States, and that probably his attendance as a witness before the Senate sitting as a court of impeachment can not be procured; and that they are also informed and believe that other evidence may be procured sufficient to convict said William W. Belknap of high crimes and misdemeanors in office as Secretary of War. They therefore recommend the adoption of the following resolution:

"*Resolved*, That the resolution instructing the Committee on the Judiciary to prepare articles of impeachment against William W. Belknap, late Secretary of

[7] House Journal, p. 503.
[8] Senate Journal, pp. 278, 279.
[9] House Journal, pp. 537, 538; Record pp. 1564–1566; House Report No. 222.

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War, for high crime and misdemeanors in office, be recommitted to said committee with power to take further proof, to send for persons and papers, to sit during the sessions of the House, and to report at any time."

Your committee, impressed with the importance of securing the fullest indemnity to such witnesses as may be required to testify in behalf of the Government before either House of Congress, or any committee of either House, or before the Senate sitting as a court of impeachment, would also recommend the immediate passage of the accompanying bill, entitled "A bill to protect witnesses who shall be required to testify in certain cases." They would further recommend that the accompanying bill, entitled "A bill in relation to witness," be introduced, printed, and referred to the Committee on the Judiciary, with leave to report thereon at any time.

In the course of the debate it was urged that so grave a proceeding as the presentation of articles of impeachment should not be undertaken on the testimony of a single witness when, by greater deliberation, other testimony might be procured.

The resolution was agreed to without division.

Immediately thereafter [10] Mr. Knott called up the bill referred to in the report:

A bill (H.R. No. 2572) to protect witnesses who shall be required to testify in certain cases.

Be it enacted, etc., That whenever any person shall be required to testify against his protest before either House of Congress or any committee thereof, or the Senate sitting as a court of impeachment, and shall so testify under protest, he shall not thereafter be held to answer criminally in any court of justice, or subject to any penalty or forfeiture, on account of any fact or act concerning which he shall be so required to testify: *Provided*, That nothing herein contained shall be so construed as to relieve any person from liability to impeachment.

Mr. Knott explained that this provision was necessary because the existing law, section 859 of the Revised Statutes, giving indemnity to witnesses, did not go far enough. A witness might decline to answer on the ground that his answer might uncover other evidence which would incriminate him.

After debate the bill was passed, yeas 206, nays 8.

In the Senate on April 11 [11] the bill was reported adversely and did not become a law.

2448. Belknap's impeachment continued.

The articles impeaching Secretary Belknap were considered in the House and agreed to without amendment.

The House decided to appoint the managers of the Belknap impeachment by resolution instead of by ballot.

One of the managers of the Belknap impeachment being excused, the House chose another.

The minority party were represented among the managers of the Belknap impeachment.

It seems to have been conceded in the Belknap impeachment that the managers should be in accord with the sentiments of the House.

Method of designating the chairman of the managers in the Belknap impeachment.

Forms of resolutions providing for presenting in the Senate the articles impeaching Secretary Belknap.

[10] House Journal, pp. 537, 538; Record, pp. 1566–1572.
[11] Senate Journal, p. 413; Senate Report, No. 253.

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The message informing the Senate that articles would be presented against Secretary Belknap contained the names of the managers.

On March 30,[12] in the House, Mr. Knott, from the Committee on the Judiciary, submitted a report, consisting of articles of impeachment (not accompanied by testimony) and a resolution. The articles appear in full in the House Journal. The resolution:

> ***Resolved*, That seven managers be appointed by ballot to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.**

On April 3,[13] the report on the articles of impeachment was called up in the House:

> **The Committee on the Judiciary, having had under consideration the resolution of the House directing them to prepare and report articles in support of the impeachment of William W. Belknap, late Secretary of War, for high crimes and misdemeanors in office, respectfully report the following articles and accompanying resolutions for the action of the House:**
>
> **"*Resolved*, That the following articles be adopted and presented to the Senate in maintenance and support of the impeachment for high crimes and misdemeanors in office of William W. Belknap, late Secretary of War:" [Here followed the articles.]**

These articles were considered in the House without any question being raised as to the propriety of considering them in Committee of the Whole. Under operation of the previous question the resolution adopting the articles, with the accompanying articles, was agreed to, a separate vote not being demanded on any article and no proposition to amend being made.

Then the resolution providing for the appointment of seven managers by ballot was considered, and Mr. Hiester Clymer proposed the following amendment in the nature of a substitute:

> Strike out all after the word "resolved" and insert:
>
> That Messrs. J. Proctor Knott, of Kentucky; Scott Lord, of New York; William P. Lynde, of Wisconsin; John A. McMahon, of Ohio; George A. Jenks, of Pennsylvania; William A. Wheeler, of New York; and George F. Hoar, of Massachusetts, be, and they are hereby appointed managers on the part of this House to conduct the impeachment exhibited against William W. Belknap, late Secretary of War of the United States.

The amendment was agreed to, and the resolution as amended was agreed to.

Thereupon Mr. Wheeler, of New York, asked to be excused from service, and the request was granted by the House.

Mr. Elbridge G. Lapham, of New York, was nominated to fill the vacancy, whereupon Mr. Eppa Hunton, of Virginia, expressed the opinion that the managers should be in accord with the sentiments of the House on the question, and asked if Mr. Lapham was thus qualified. Mr. Fernando Wood, of New York, said that in selecting managers they had not gone into any very severe examination of qualifications, assuming that they would represent the House in the opinions which it had expressed unanimously. Without further objection Mr. Lapham was chosen by the House as a manager.

Then, at the request of Mr. Knott, the name of Mr. Lord was placed at the head of the list of managers.

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[12] House Journal, pp. 696–703; Record, pp. 2081, 2082; House Report No. 345.
[13] House Journal, pp. 726–733; Record, pp. 2159–2161.

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Of the managers, as thus chosen, the first five were Members of the majority party in the House and the remaining two were Members of the minority party.

On motion of Mr. Clymer the following resolutions were agreed to:

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against William W. Belknap, late Secretary of War, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

Resolved, That a message be sent to the Senate to inform them that this House have appointed Mr. Scott Lord, of New York; Mr. J. Proctor Knott, of Kentucky; Mr. William P. Lynde, of Wisconsin; Mr. John A. McMahon, of Ohio; Mr. George A. Jenks, of Pennsylvania; Mr. Elbridge G. Lapham, of New York; and Mr. George F. Hoar, of Massachusetts, managers to conduct the impeachment against William W. Belknap, late Secretary of War, and have directed the said managers to carry to the Senate the articles agreed upon by this House to be exhibited in maintenance of their impeachment against said William W. Belknap, and that the Clerk of the House do go with said message.

As first offered, the second resolution did not contain the names of the managers; but Mr. James A. Garfield, of Ohio, suggested that inasmuch as the Senate was always informed of the names of the managers of a conference, it seemed right that they should be similarly informed in this far more important proceeding. So the names were included.

2449. Belknap's impeachment continued.

Ceremonies and forms in presenting in the Senate the articles impeaching Secretary Belknap.

The articles of impeachment in the Belknap case.

Forms of messages preceding the presentation of the articles impeaching Secretary Belknap.

The House did not accompany their managers when articles of impeachment were presented against Secretary Belknap.

The articles impeaching Secretary Belknap were signed by the Speaker and attested by the Clerk.

The chairman of the managers having read the articles impeaching Secretary Belknap, laid them on the table of the Senate.

Having presented in the Senate the articles impeaching Secretary Belknap, the managers reported verbally in the House.

On April 3,[14] in the Senate, Mr. George M. Adams, Clerk of the House of Representatives, appeared at the bar of the Senate and said:

Mr. President, I am directed to inform the Senate that the House of Representatives has passed the following resolutions: [Here followed the resolutions.]

The President pro tempore said:

The Secretary will inform the House of Representatives that the Senate will receive the managers for the purpose of exhibiting articles of impeachment agreeably to notice received.

The Clerk of the House thereupon withdrew.

On April 4,[15] in the House, the Secretary of the Senate delivered this message:

I am directed to inform the House that the Senate is ready to receive the managers appointed by the House of Representatives to carry to the Senate articles of impeachment against William W. Belknap, Secretary of War.

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[14] Senate Journal, p. 378; Record, p. 2155.
[15] House Journal, p. 743; Record, p. 2182.

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Soon after the receipt of this message Mr. Manager Lord, rising to a question of privilege,[16] asked if it was the wish of the House to accompany the managers in the presentation of the articles of impeachment. It was recalled that in the cases of Judge Humphreys and President Johnson the House had accompanied the managers; but, on the other hand, it was pointed out that the message of the Senate referred only to the managers. No proposition that the House attend was made and the matter dropped.

Soon after, in the Senate,[17] the managers of the impeachment on the part of the House of Representatives appeared at the bar (at 1 o'clock and 25 minutes p.m.) and their presence was announced by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The managers on the part of the House of Representatives are admitted and the Sergeant-at-Arms will conduct them to seats provided for them within the bar of the Senate.

The managers were thereupon escorted by the Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

Mr. Manager LORD. Mr. President, the managers on the part of the House of Representatives are ready to exhibit on the part of the House articles of impeachment against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against William W. Belknap, late Secretary of War.

Mr. Manager Lord rose and read the articles of impeachment,[18] as follows:

Articles exhibited by the House of Representatives of the United States of America in the names of themselves and of all the people of the United States of America, against William W. Belknap, late Secretary of War, in maintenance and support of their impeachment against him for high crimes and misdemeanors while in said office.

ARTICLE I

That William W. Belknap, while he was in office as Secretary of War of the United States of America, to wit, on the 8th day of October, 1870, had the power and authority, under the laws of the United States, as Secretary of War, as aforesaid, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States; that said Belknap, as Secretary of War, as aforesaid, on the day and year aforesaid, promised to appoint one Caleb P. Marsh to maintain said trading establishment at said military post; that thereafter, to wit, on the day and year aforesaid, the said Caleb P. Marsh and one John S. Evans entered into an agreement in writing substantially as follows, to wit:

Articles of agreement made and entered into this 8th day of October, A.D. 1870, by and between John S. Evans, of Fort Sill, Indian Territory, United States of America, of the first part, and Caleb P. Marsh, of No. 51 West Thirty-fifth street, of the city, county, and State of New York, of the second part, witnesseth, namely:

"Whereas the said Caleb P. Marsh has received from Gen. William W. Belknap, Secretary of War of the United States, the appointment of posttrader at Fort Sill, aforesaid; and whereas the name of said John S. Evans is to be filled into the commission of appointment of said posttrader at Fort Sill, aforesaid, by permission and at the instance and request of said Caleb P. Marsh and for the purpose of carrying out the terms of this agreement; and whereas said John S.

[16] Record, p. 2184.
[17] Senate Journal, pp. 888–890; Record, pp. 2178–2180.
[18] These articles appear in full in the Senate Journal.

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Evans is to hold said position of posttrader, as aforesaid, solely as the appointee of said Caleb P. Marsh and for the purposes hereinafter stated:

"Now, therefore, said John S. Evans, in consideration of said appointment and the sum of $1 to him in hand paid by said Caleb P. Marsh, the receipt of which is hereby acknowledged, hereby covenants and agrees to pay to said Caleb P. Marsh the sum of $12,000 annually, payable quarterly in advance, in the city of New York, aforesaid; said sum to be so payable during the first year of this agreement absolutely and under all circumstances, anything hereinafter contained to the contrary notwithstanding; and thereafter said sum shall be so payable, unless increased or reduced in amount, in accordance with the subsequent provisions of this agreement.

"In consideration of the premises, it is mutually agreed between the parties aforesaid as follows, namely:

"First. This agreement is made on the basis of seven cavalry companies of the United States Army, which are now stationed at Fort Sill aforesaid.

"Second. If at the end of the first year of this agreement the forces of the United States Army stationed at Fort Sill, aforesaid, shall be increased or diminished not to exceed one hundred men, then this agreement shall remain in full force and unchanged for the next year. If, however, the said forces shall be increased or diminished beyond the number of one hundred men, then the amount to be paid under this agreement by said John S. Evans to said Caleb P. Marsh shall be increased or reduced in accordance therewith and in proper proportion thereto. The above rule laid down for the continuation of this agreement at the close of the first year thereof shall be applied at the close of each succeeding year so long as this agreement shall remain in force and effect.

"Third. This agreement shall remain in force and effect so long as said Caleb P. Marsh shall hold or control, directly or indirectly, the appointment and position of posttrader at Fort Sill, aforesaid.

"Fourth. This agreement shall take effect from the date and day the Secretary of War, aforesaid, shall sign the commission of posttrader at Fort Sill, aforesaid, said commission to be issued to said John S. Evans at the instance and request of said Caleb P. Marsh and solely for the purpose of carrying out the provisions of this agreement.

"Fifth. Exception is hereby made in regard to the first quarterly payment under this agreement, it being agreed and understood that the same may be paid at any time within the next thirty days after the said Secretary of War shall sign the aforesaid commission of posttrader at Fort Sill.

"Sixth. Said Caleb P. Marsh is at all times, at the request of said John S. Evans, to use any proper influence he may have with said Secretary of War for the protection of said John S. Evans while in the discharge of his legitimate duties in the conduct of the business as posttrader at Fort Sill, aforesaid.

"Seventh. Said John S. Evans is to conduct the said business of posttrader at Fort Sill, aforesaid, solely on his own responsibility and in his own name, it being expressly agreed and understood that said Caleb P. Marsh shall assume no liability in the premises whatever.

"Eighth. And it is expressly understood and agreed that the stipulations and covenants aforesaid are to apply to and bind the heirs, executors, and administrators of the respective parties.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"JOHN S. EVANS. [SEAL.]
"C. P. MARSH. [SEAL.]

"Signed, sealed, and delivered in presence of—
"E. T. BARTLETT."

That thereafter, to wit, on the 10th day of October, 1870, said Belknap, as Secretary of War, aforesaid, did, at the instance and request of said Marsh, at the city of Washington, in the District of Columbia, appoint said John S. Evans to maintain said trading establishment at Fort Sill, the military post aforesaid, and in consideration of said appointment of said Evans, so made by him as Secretary of War, as aforesaid, the said Belknap did, on or about the 2d day of November, 1870, unlawfully and corruptly receive from said Caleb P. Marsh the sum of $1,500, and that at divers times thereafter, to wit, on or about the 17th of January, 1871, and at or about the end of each three months during the term of one whole year, the said William W. Belknap, while still in office as Secretary of War, as aforesaid, did unlawfully receive from said Caleb P. Marsh like sums of $1,500, in consideration of the appointment of the said John S. Evans by him, the said Belknap, as Secretary of War, as aforesaid, and in considera-

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tion of his permitting said Evans to continue to maintain the said trading establishment at said military post during that time; whereby the said Willam W. Belknap, who was then Secretary of War, as aforesaid, was guilty of high crimes and misdemeanors in office.

ARTICLE II

That said William W. Belknap, while he was in office as Secretary of War of the United States of America, did, at the city of Washington, in the District of Columbia, on the 4th day of November, 1873, willfully, corruptly, and unlawfully take and receive from one Caleb P. Marsh the sum of $1,500, in consideration that he would continue to permit one John S. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, which said establishment said Belknap, as Secretary of War, as aforesaid, was authorized by law to permit to be maintained at said military post, and which the said Evans had been before that time appointed by said Belknap to maintain; and that said Belknap, as Secretary of War, as aforesaid, for said consideration, did corruptly permit the said Evans to continue to maintain the said trading establishment at said military post. And so the said Belknap was thereby guilty, while he was Secretary of War, of a high misdemeanor in his said office.

ARTICLE III

That said William W. Belknap was Secretary of War of the United States of America before and during the month of October 1870, and continued in office as such Secretary of War until the 2d day of March 1876; that as Secretary of War as aforesaid said Belknap had authority, under the laws of the United States, to appoint a person to maintain a trading establishment at Fort Sill, a military post of the United States, not in the vicinity of any city or town; that on the 10th day of October, 1870, said Belknap, as Secretary of War as aforesaid, did, at the city of Washington, in the District of Columbia, appoint one John S. Evans to maintain said trading establishment at said military post; and that said John S. Evans, by virtue of said appointment, has since, till the 2d day of March, 1876, maintained a trading establishment at said military post, and that said Evans, on the 8th day of October, 1870, before he was so appointed to maintain said trading establishment as aforesaid, and in order to procure said appointment and to be continued therein, agreed with one Caleb P. Marsh that, in consideration that said Belknap would appoint him, the said Evans, to maintain said trading establishment at said military post, at the instance and request of said Marsh, he, the said Evans, would pay to him a large sum of money, quarterly, in advance, from the date of his said appointment by said Belknap, to wit, $12,000 during the year immediately following the 10th day of October, 1870, and other large sums of money, quarterly, during each year that he, the said Evans, should be permitted by said Belknap to maintain said trading establishment at said post; that said Evans did pay to said Marsh said sum of money quarterly during each year after his said appointment, until the month of December, 1875, when the last of said payments was made; that said Marsh, upon the receipt of each of said payments, paid one-half thereof to him, the said Belknap. Yet the said Belknap, well knowing these facts, and having the power to remove said Evans from said position at any time, and to appoint some other person to maintain said trading establishment, but criminally disregarding his duty as Secretary of War, and basely prostituting his high office to his lust for private gain, did unlawfully and corruptly continue said Evans in said position and permit him to maintain said establishment at said military post during all of said time, to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States, against public policy, and to the great disgrace and detriment of the public service.

Whereby the said William W. Belknap was, as Secretary of War as aforesaid, guilty of high crimes and misdemeanors in office.

ARTICLE IV

That said William W. Belknap, while he was in office and acting as Secretary of War of the United States of America, did, on the 10th day of October, 1870, in the exercise of the power and authority vested in him as Secretary of War as aforesaid by law, appoint one John E. Evans to maintain a trading establishment at Fort Sill, a military post of the United States, and he, the said Belknap, did

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receive, from one Caleb P. Marsh, large sums of money for and in consideration of his having so appointed said John S. Evans to maintain said trading establishment at said military post, and for continuing him therein, whereby he has been guilty of high crimes and misdemeanors in his said office.

Specification 1.—On or about the 2d day of November, 1870, said William W. Belknap, while Secretary of War as aforesaid, did receive from Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 2.—On or about the 17th day of January, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and for continuing him therein.

Specification 3.—On or about the 18th day of April, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 4.—On or about the 25th day of July, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 5.—On or about the 10th day of November, 1871, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 6.—On or about the 15th day of January, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 7.—On or about the 13th day of June, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 8.—On or about the 22d day of November, 1872, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 9.—On or about the 28th day of April, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,000, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 10.—On or about the 16th day of June, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,700, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 11.—On or about the 4th day of November, 1873, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 12.—On or about the 22d day of January, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 13.—On or about the 10th day of April, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans

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to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 14.—On or about the 9th day of October, 1874, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 15.—On or about the 24th day of May, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 16.—On or about the 17th day of November, 1875, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $1,500, in consideration of his having appointed said John E. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

Specification 17.—On or about the 15th day of January, 1876, the said William W. Belknap, while Secretary of War as aforesaid, did receive from said Caleb P. Marsh $750, in consideration of his having appointed said John S. Evans to maintain a trading establishment at Fort Sill aforesaid, and continuing him therein.

ARTICLE V

That one John S. Evans was, on the 10th day of October, in the year 1870, appointed by the said Belknap to maintain a trading establishment at Fort Sill, a military post on the frontier, not in the vicinity of any city or town, and said Belknap did, from that day continuously to the 2d day of March, 1876, permit said Evans to maintain the same; and said Belknap was induced to make said appointment by the influence and request of one Caleb P. Marsh; and said Evans paid to said Marsh, in consideration of such influence and request and in consideration that he should thereby induce said Belknap to make said appointment, divers large sums of money at various times, amounting to about $12,000 a year from the date of said appointment to the 25th day of March, 1872, and to about $6,000 a year thereafter until the 2d day of March, 1876, all which said Belknap well knew; yet said Belknap did, in consideration that he would permit said Evans to continue to maintain said trading establishment and in order that said payments might continue and be made by said Evans to said Marsh as aforesaid, corruptly receive from said Marsh, either to his, the said Belknap's own use or to be paid over to the wife of said Belknap, divers larger sums of money at various times, namely: The sum of $1,500 on or about the 2d day of November, 1870; the sum of $1,500 on or about the 17th day of January, 1871; the sum of $1,500 on or about the 18th day of April, 1871; the sum of $1,500 on or about the 25th day of July, 1871; the sum of $1,500 on or about the 10th day of November, 1871; the sum of $1,500 on or about the 15th day of January, 1872; the sum of $1,500 on or about the 13th day of June, 1872; the sum of $1,500 on or about the 22d day of November, 1872; the sum of $1,000 on or about the 28th day of April, 1873; the sum of $1,700 on or about the 16th day of June, 1873; the sum of $1,500 on or about the 4th day of November, 1873; the sum of $1,500 on or about the 22d day of January, 1874; the sum of $1,500 on or about the 10th day of April, 1874; the sum of $1,500 on or about the 9th day of October, 1874; the sum of $1,500 on or about the 24th day of May, 1875; the sum of $1,500 on or about the 17th day of November, 1875; the sum of $750 on or about the 15th day of January, 1876; all of which acts and doings were while the said Belknap was Secretary of War of the United States, as aforesaid, and were a high misdemeanor in said office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said William W. Belknap, late Secretary of War of the United States, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article, accusation, or impeachment which shall be exhibited by them, as the case shall require, do demand that the said William W. Belknap may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceed-

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ings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

MICHAEL C. KERR,
Speaker of the House of Representatives.

Attest.
GEO. M. ADAMS,
Clerk of the House of Representatives.

The reading of the articles of impeachment having been concluded, the President pro tempore informed the managers that the Senate would take proper order on the subject of the impeachment, of which due notice would be given to the House of Representatives.

The managers, by their chairman, Mr. Lord, then delivered the articles of impeachment at the table of the Secretary and withdrew.

Soon thereafter, in the House, the Speaker pro tempore [19] directed that business be suspended to receive a report from the managers on the part of the House of the impeachment of W. W. Belknap, late Secretary of War.

The managers appeared at the bar, when Mr. Lord said:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against William W. Belknap, late Secretary of War, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[20]

2450. Belknap's impeachment continued.

At the organization of the Senate for the Belknap trial the oath was administered by the Chief Justice.

The Senate organized for the Belknap trial after the articles of impeachment had been presented.

The Senate, having organized for the Belknap trial, informed the House by message.

On April 5,[21] in the Senate, Mr. Edmunds offered this resolution, which was thereupon agreed to:

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chambers at 1 o'clock p.m. this day, or, in case of his inability to attend, any one of the associate justices.

The Chair thereupon appointed Messrs. Edmunds and Allen G. Thurman, of Ohio, as the committee.

Soon thereafter the following proceedings occurred:

The Chief Justice of the United States, Hon. Morrison R. Waite, entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hours of 1 o'clock having arrived, the Senate, according to its rule, will now proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War. The Chief Justice will take the seat provided for him at the right of the Chair.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Senate will give attention while the constitutional oath is being administered.

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[19] William A. Wheeler, of New York, Speaker pro tempore.
[20] House Journal, p. 745; Record, p. 2186.
[21] Senate Journal, pp. 394, 908,, 909; Record, pp. 2212, 2215, 2216.

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The Chief Justice administered the oath to the President pro tempore, as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of William W. Belknap, late Secretary of War, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Secretary will now call the roll of Senators, alphabetically in groups of six, and Senators as they are so called will advance to the desk and take the oath.

After the oaths had been administered Mr. Frederick T. Frelinghuysen, of New Jersey, offered the following, which was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and is ready to receive the managers on the part of the House at its bar.

And in obedience thereto the Secretary delivered the following message at the bar of the House: [22]

Mr. Speaker, I am directed to inform the House of Representatives that the Senate is now organized for the trial of articles of impeachment against William W. Belknap, late Secretary of War, and it is ready to receive the managers of impeachment on the part of the House at its bar.

2451. Belknap impeachment continued.

The House being notified that the Senate was organized for the trial of Secretary Belknap, the managers attended and demanded that process issue.

On the demand of the managers the Senate ordered process to issue against Secretary Belknap, fixing the day of return.

Having demanded of the Senate that process issue against Secretary Belknap, the managers reported verbally to the House.

At 1 o'clock and 40 minutes p.m. the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.[23]

The PRESIDENT pro tempore. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT pro tempore. Gentlemen managers, the Senate is now organized for the trial of the impeachment of William W. Belknap, late Secretary of War.

Thereupon Mr. Manager Lord, chairman of the managers, rose and said:

We are instructed by the House of Representatives, as its managers, to demand that the Senate issue process against William W. Belknap, late Secretary of War; that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives, through its managers, before the Senate.

Thereupon Mr. Edmunds offered the following, which was agreed to by the Senate:

Ordered. That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial of impeachment, to William W. Belknap, returnable on Monday, the 17th day of the present month, at 1 o'clock in the afternoon.

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[22] House Journal, p. 750; Record, p. 2228.
[23] Senate Journal, p. 909; Record of trial, p. 4.

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Thereupon, after a discussion caused by the fact that the rules for impeachment trials provided for the return of the summons at 12:30, while the order just adopted fixed 1 o'clock as the hour, Mr. Edmunds moved that the Senate sitting for the trial of impeachment adjourn to Monday, the 17th instant at 12:30 o'clock. And this motion was agreed to, yeas 38, nays 10.

And thereupon the Senate resumed its legislative session.[24]

In the House meanwhile the managers had returned[25] and reported—

that, in answer to the summons from the Senate, they proceeded to its bar, and that the Senate had fixed Monday, the 17th of this month, as the day on which the process against William W. Belknap, late Secretary of War, shall be returnable.

2452. Belknap's impeachment continued.

Ceremonies and forms of the return of the writ of summons against Secretary Belknap.

Secretary Belknap appeared in person and with counsel to answer the articles of impeachment.

The Chief Justice administered the oath to the Sergeant-at-Arms on the return of the writ of summons in the Belknap case.

On April 17[26] the following record appears:

The Chief Justice of the United States entered the Senate Chamber, escorted by Messrs. Edmunds and Thurman, the committee appointed for the purpose.

The PRESIDENT pro tempore. The hour of 12 o'clock and 30 minutes having arrived, in pursuance of rule the legislative and executive business of the Senate will be suspended and the Senate will proceed the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The Chief Justice took a seat by the side of the President pro tempore of the Senate.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The PRESIDENT pro tempore. The Secretary will now call the names of those Senators who have not been sworn, and such Senators, as they are called, will advance to the desk and take oath.

Certain Senators have been sworn,

On motion of Mr. Edmunds, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is in its Chamber and ready to proceed with the trial of the impeachment of William W. Belknap, and that seats are provided for the accommodation of the Members.

The PRESIDENT pro tempore. The Secretary will invite the House accordingly.

The message was presently delivered[27] in the House of Representatives, where a discussion arose as to whether the House should attend or not, and as to the manner of attendance. My Lord stated that the usual custom had been for the House to go over on the trial, but for some reason the Senate had seen fit to change the custom and invite the House on this day, and it seemed to him that the House

[24] Senate Journal, p. 395.
[25] House Journal, p. 750; Record, p. 2229.
[26] Senate Journal, p. 910; Record of trial, pp. 5, 6.
[27] House Journal, p. 811; Record, pp. 2512, 2513.

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should attend in a body, headed by the Speaker. Mr. George F. Hoar, of Massachusetts, suggested that an examination of the precedents showed that it would be better to go over as a Committee of the Whole; and on his motion—

the House resolved itself into a Committee of the Whole House, and proceeded in that capacity of the Senate Chamber.

Meanwhile, at 1 o'clock p.m., William W. Belknap entered the Senate Chamber, accompanied by his counsel, Hon. Jeremiah S. Black, Hon. Montgomery Blair, and Hon. M. H. Carpenter, who were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

At 1 o'clock and 2 minutes p.m., the Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDENT pro tempore. The managers will be admitted and conducted to seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Scott Lord, of New York; Hon. J. Proctor Knott, of Kentucky; Hon. William P. Lynde, of Wisconsin; Hon. J. A. McMahon, of Ohio; Hon. G. A. Jenks, of Pennsylvania; Hon. E. G. Lapham, of New York, and Hon. George F. Hoar, of Massachusetts.

Mr. Manager LORD. Mr. President, in accordance with the invitation extended, the House of Representatives has resolved itself into a Committee of the Whole and will attend upon this sitting of this court on being waited upon by the Sergeant-at-Arms.

The PRESIDENT pro tempore. The Sergeant-at-Arms will wait upon the House of Representatives and invite them to the Chamber of the Senate.

At 1 o'clock and 5 minutes p.m., the Sergeant-at-Arms announced the presence of the Members of the House of Representatives, who entered the Senate Chamber preceded by the chairman of the Committee of the Whole House (Mr. Samuel J. Randall, of Pennsylvania), into which that body had resolved itself to witness the trial, who was accompanied by the Speaker and Clerk of the House.

The PRESIDENT pro tempore. The Secretary will now read the minutes of the sitting on Wednesday, the 5th instant.

The Secretary read the Journal of proceedings of the Senate sitting for trial of the impeachment of Wednesday, April 5, 1876.

The PRESIDENT pro tempore. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons addressed to William W. Belknap and the foregoing precept addressed to me were duly served upon the said William W. Belknap by delivering to and leaving with him true and attested copies of the same at No. 2022 G street, Washington City, the residence of the said William W. Belknap, on Thursday the 6th day of April, 1876, at 6 o'clock and 40 minutes in the afternoon of that day.

JOHN R. FRENCH,
Sergeant-at-Arms of the Senate of the United States.

The PRESIDENT pro tempore. The Chair understands that Rule 9 will be suspended for reasons already stated, and the Chief Justice will now administer the oath to the officer attesting the truth of this return.[28]

[28] The Rule No. 9 provided for the administration of the oath by the Presiding Officer, but as a doubt had arisen as to the legal competency of an oath administered by one not especially empowered by statute so to do, the Chief Justice had been invited to attend.

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The Chief Justice administered the following oath to the Sergeant-at-Arms:

I, John R. French, do solemnly swear that the return made by me upon the process issued on the 6th day of April, by the Senate of the United States, against W. W. Belknap, is truly made, and that I have performed such service as therein described: So help me God.

The PRESIDENT pro tempore. The committee will please escort the Chief Justice to the Supreme Court Room.

The Chief Justice retired, escorted by the committee, Mr. Edmunds and Mr. Thurman.

The PRESIDENT pro tempore. The Sergeant-at-Arms will now call William W. Belknap, the respondent, to appear and answer the charges of impeachment brought against him.

The SERGEANT-AT-ARMS. William W. Belknap, William W. Belknap, appear and answer the articles of impeachment exhibited against you by the House of Representatives.

William W. Belknap, accompanied by Mr. Matt H. Carpenter, Mr. Jeremiah S. Black, and Mr. Montgomery Blair, as counsel, having appeared at the bar of the Senate, were directed by the Presiding Officer to take the seats assigned them.

The Presiding Officer then informed the respondent that the Senate is now sitting for the trial of William W. Belknap, late Secretary of War, upon articles of impeachment exhibited by the House of Representatives, and will now hear him in answer thereto.

2453. Belknap's impeachment continued.

The answer of Secretary Belknap to the articles of impeachment.

The answer of Secretary Belknap demurred to the articles, alleging that he was not a civil officer of the United States when they were exhibited.

Form of announcing the appearance of counsel in the Belknap trial.

The answer of Secretary Belknap being presented, the Senate, on request, ordered a copy of the answer to be furnished to the managers.

The Senate allowed to the House time for preparation of a replication in the Belknap trial, and informed the House thereof by message.

The House determined, after respondent's answer, that it would be represented at the Belknap trial by its managers only.

Whereupon, Mr. Carpenter, of counsel, on behalf of the said William W. Belknap, made answer:

That William W. Belknap a private citizen of the United States and of the State of Iowa, in obedience to the summons of the Senate sitting as a court of impeachment to try the articles presented against him by the House of Representatives of the United States, appears at the bar of the Senate sitting as a court of impeachment and interposes the following plea; which I will ask the Secretary to read and request that it may be filed.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, named in the said articles of impeachment, comes here before the honorable the Senate of the United States sitting as a court

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of impeachment, in his own proper person, and says that this honorable court ought not to have or take further cognizance of the said articles of impeachment exhibited and presented against him by the House of Representatives of the United States, because, he says, that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him, the said Belknap, by the said House of Representatives, he, the said Belknap, was not, nor hath he since been, nor is he now an officer of the United States; but at the said times was, ever since hath been, and now is a private citizen of the United States and of the State of Iowa; and this he, the said Belknap, is ready to verify; wherefore he prays judgment whether this court can or will take further cognizance of the said articles of impeachment.

WM. W. BELKNAP.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

William W. Belknap, being first duly sworn on oath, says that the foregoing plea by him subscribed is true in substance and fact.

WM. W. BELKNAP.

Subscribed and sworn to before me this 17th day of April, 1876.

DAVID DAVIS,
Associate Justice of the Supreme Court of the United States.

Mr. CARPENTER. Mr. President, Judge Jeremiah S. Black, Hon. Montgomery Blair, and myself also appear as counsel for Mr. Belknap.

The PRESIDENT pro tempore. The Secretary will note the appearance of the respondent and the presence of the counsel named.

Mr. Manager Lord thereupon submitted this motion:

The Managers on the part of the House of Representatives request a copy of the plea filed by W. W. Belknap, late Secretary of War, and the House of Representatives desire time until Wednesday, the 19th instant, at 1 o'clock, to consider what replication to make to the plea of the said W. W. Belknap, late Secretary of War.

It was ordered accordingly, and the Secretary was directed to notify the House of Representatives thereof.

Thereupon the Senate sitting for the trial adjourned to Wednesday, the 19th instant, at 12:30 o'clock.

The House, in Committee of the Whole House, returned to their Hall—

and the Speaker having resumed the Chair, Mr. Randall reported that the committee, in pursuance of the order of the House, had attended the Senate sitting as a court of impeachment, in company with the Managers on the part of the House.[29]

Soon thereafter the Secretary of the Senate delivered a message as to the time set for the trial, which message was, on motion of Mr. Hoar, referred to the managers.

Later, on this day, Mr. Randall presented this resolution, which was agreed to without debate or division:[30]

Resolved, That in the future proceedings of the impeachment trial of W. W. Belknap, late Secretary of War, the House appear, in the prosecution of said impeachment before the Senate sitting as a court of impeachment by its managers only.

2454. Belknap's impeachment continued.

The replication of the House to the answer of respondent in the Belknap trial.

Forms and ceremonies of presenting in the Senate the replication in the Belknap trial.

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[29] House Journal, pp. 811, 812.
[30] House Journal, p. 814; Record, p. 2533.

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The House, in their replication in the Belknap trial, alleged a new matter not set forth in the articles.

In the House, on April 19,[31] Mr. Lord, by direction of the managers, reported the replication, and without debate or division it was—

Ordered, That the House adopt the replication to the answer of William W. Belknap, as now submitted by the managers.

Then it was

Resolved, That a message be sent to the Senate, by the Clerk of the House, informing the Senate that the House of Representatives has adopted a replication to the plea of William W. Belknap, late Secretary of War, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House.

This message was presently delivered in the Senate sitting for the impeachment, the sitting having been opened in due form and the respondent and his counsel being present. The managers presently attended and were assigned seats, whereupon, according to the record—[32]

The PRESIDENT pro tempore. Gentlemen managers, in accordance with the order of the Senate fixing the hour of 1 o'clock as the time at which it will hear you, the Senate is now ready to hear you.

Mr. Manager LORD. Mr. President, the House of Representatives having adopted a replication to the plea of William W. Belknap to the jurisdiction of this court, as advised by the resolution just read, the managers are instructed to present the replication to the Senate sitting as a court of impeachment, and to request that the same may be read the Secretary and filed among the Senate's papers.

The PRESIDENT pro tempore. The replication will be read by the Secretary.

The Secretary read at follows:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

The replication of the House of Representatives of the United States in their own behalf, and also in the name of the people of the United States, to the plea of William W. Belknap to the articles of impeachment exhibited by them to the Senate against the said William W. Belknap.

The House of Representatives of the United States, prosecuting, on behalf of themselves and the people of the United States, the articles of impeachment exhibited by them to the Senate of the United States against said William F. Belknap, reply to the plea of said William W. Belknap, and say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles of impeachment, because they say that at the time all the acts charged in said articles of impeachment were done and committed, and thence continuously done, to the 2d day of March, A.D. 1876, the said William W. Belknap was Secretary of War of the United States, as in said articles of impeachment averred, and, therefore, that by the Constitution of the United States the House of Representatives had power to prefer the articles of impeachment, and the Senate have full and the sole power to try the same. Wherefore they demand that the plea aforesaid of the said William W. Belknap be not allowed, but that the said William W. Belknap be required to answer the said articles of impeachment.

II

The House of Representatives of the United States, so prosecuting in behalf of themselves and the people of the United States the said articles of impeachment exhibited by them to the Senate of the United States against the said William W. Belknap, for a second and further replication to the plea of the said William W. Belknap, say that the matters alleged in the said plea are not sufficient to exempt the said William W. Belknap from answering the said articles

[31] House Journal, pp. 822, 823; Record, p. 2592.
[32] Senate Journal, pp. 913, 914; Record of trial, pp. 7, 8.

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of impeachment, because they say that at the time of the commission by the said William W. Belknap of the acts and matters set forth in the said articles of impeachment he, said William W. Belknap, was an officer of the United States, as alleged in the said articles of impeachment; and they say that the said William W. Belknap, after the commission of each one of the acts alleged in the said articles, was and continued to be such officer, as alleged in said articles, until and including the 2d day of March, A.D. 1876, and until the House of Representatives, by its proper committee, had completed its investigation of his official conduct as such officer in regard to the matters and things set forth as official misconduct in the said articles, and the said committee was considering the report it should make to the House of Representatives upon the same, the said Belknap being at the time aware of such investigation and of the evidence taken and of such proposed report.

And the House of Representatives further say that, while its said committee was considering and preparing its said report to the House of Representatives recommending the impeachment of the said William W. Belknap for the matters and things set forth in the said articles, the said William W. Belknap, with full knowledge thereof, resigned his position as such officer on the said 2d day of March, A.D. 1876, with intent to evade the proceedings of impeachment against him. And the House of Representatives resolved to impeach the said William W. Belknap for said matters as in said articles set forth on said 2d day of March, A.D. 1876. And the House of Representatives say that by the Constitution of the United States the House of Representatives had power to prefer said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has full power to try the same.

Wherefore the House of Representatives demand that the plea aforesaid be not allowed, but that the said William W. Belknap be compelled to answer the said articles of impeachment.

Attest:

MICHAEL C. KERR,
Speaker of the House of Representatives.

GEORGE M. ADAMS,
Clerk of the House of Representatives.

The PRESIDENT pro tempore. If there be no objection, the replication will be filed. The Chair hears none.

2455. Belknap's impeachment continued.

Forms of rejoinder, surrejoinder, and similiter filed in the Belknap trial.

Form of application of respondent for time to prepare a rejoinder in the Belknap trial.

The later pleadings in the Belknap trial were filed with the Secretary of the Senate during a recess of the Senate sitting for the trial.

The surrejoinder of the House of Representatives in the Belknap trial was signed by the Speaker and attested by the Clerk.

Thereupon Mr. Carpenter, of counsel for the respondent, submitted in writing this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment presented by the House of Representatives against the said William W. Belknap.

Mr. President, the respondent asks for copies of the replications this day filed by the managers and asks for time until Monday next to frame pleadings to meet the same.

WILLIAM W. BELKNAP.

Mr. Edmunds thereupon proposed an order relating to the filing of a rejoinder which would have required the respondent to file at a time

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when the Senate would not be sitting for the trial. To this Mr. Carpenter objected, saying that in their pleadings they did not desire to deal with anything less than the court. They could not file with the House of Representatives, because they had no standing there. So, on suggestion of Mr. Roscoe Conkling, of New York, Mr. Edmunds submitted a modified order, which was agreed to, as follows:

Ordered, That the respondent file his rejoinder with the Secretary on or before the 24th day of April instant, who shall deliver a copy thereof to the Clerk of the House of Representatives, and that the House of Representatives file their surrejoinder, if any, on or before the 25th day of April instant, a copy of which shall be delivered by the Secretary to the counsel for the respondent.

Ordered, That the trial proceed on the 27th day of April instant, at 12 o'clock and 30 minutes afternoon.

Thereupon the Senate, sitting for the trial, adjourned to April 27.

On April 27,[33] the Senate at the appointed hour discontinued its legislative business and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant-at-Arms.

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the journal of the last session's proceedings to be read.

Then, the journal having been read, the President pro tempore directed the reading of the rejoinder filed by the respondent with the Secretary of the 24th instant under the orders of the Senate of the 19th instant:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap saith that the replication of the House of Representatives first above pleaded to the said plea of him, the said Belknap, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said House of Representatives to have or maintain impeachment thereof against him, the said Belknap, and that he, the said Belknap, is not bound by law to answer the same.

And this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, he, the said Belknap, prays judgment if the said House of Representatives ought to have or maintain this impeachment against him, etc.

WM. W. BELKNAP.

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

Upon articles of impeachment of the House of Representatives of the United States of America, of high crimes and misdemeanors.

And the said William W. Belknap, as to the second replication of the House of Representatives of the United States, secondly above pleaded, saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that it is true, as in that replication alleged, that he, the said Belknap, was Secretary of War of the United States from any time until and including the 2d day of March, A.D. 1876, and of this he, the said Belknap, demands trial according to law.

[33] Senate Journal, pp. 915–920; Record of trial, pp. 8–10.

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II

And the said Belknap further saith, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he saith that it is not true, as in that replication alleged, that he, the said Belknap, was Secretary of War until the said House of Representatives, by any committee of the said House raised or instructed for that purpose, or having any authority from the House of Representatives in that behalf, had investigated the official conduct of him, the said Belknap, as Secretary of War, in regard to the matters and things set forth as official misconduct in the said articles of impeachment; and of this he, the said Belknap, demands trial according to law.

III

And the said Belknap, as to the said second replication of the said House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by reason of anything in that replication alleged, to have or maintain the said impeachment against him, the said Belknap, because he says that at the city of Washington, in the District of Columbia, on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, he, the said Belknap, resigned the office of Secretary of War, by written resignation under his hand, addressed and delivered to the President of the United States, and the President of the United States then and there accepted the said resignation, by acceptance in writing under his hand, then and there indorsed upon the said written resignation; so that the said Belknap then and there ceased to be Secretary of War of the United States, and since that time he, the said Belknap, has not been an officer of the United States, but has been a private citizen of the United States and of the State of Iowa, as stated by said Belknap in his said plea; and that at the time he, the said Belknap, resigned as aforesaid, and the said resignation was accepted as aforesaid, the said House of Representatives had not taken any proceeding for the investigation or examination of any of the charges set forth in the said articles of impeachment as official misconduct of him, the said Belknap, as Secretary of War; nor had the said House of Representatives raised any committee of the said House, nor directed nor instructed any committee of the said House, to make inquiry or investigation in that behalf.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

IV

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against him, the said Belknap, because he says that when the said House of Representatives took the first proceeding in relation to the impeachment of him, the said Belknap, and when the matter was first mentioned in the said House—that is, in the afternoon of the 2d day of March, A.D. 1876—the said House of Representatives was fully advised and well knew that he, the said Belknap, had before then resigned the said office of Secretary of War, by resignation in writing, under his hand addressed and delivered to the President of the United States, and that the President of the United States had also before that time, as President as aforesaid, accepted the said written resignation, by acceptance in writing, signed by him and indorsed on the said written resignation, and that he, the said Belknap, was not then an officer of the United States, as the facts were.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

V

And the said Belknap, as to the said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives of the United States, by reason of anything in that replication alleged, ought not to have or maintain the said impeachment against

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him, the said Belknap, because he says that, although true it is that a certain committee of the said House, called the Committee on the Expenditures of the War Department, had been pretending to make some inquiry into or investigation of the matters and things set forth in said articles of impeachment as official misconduct of him, the said Belknap, but without any authority from or direction by the House of Representatives in that behalf, yet he, the said Belknap, says that said committee had not completed its said pretended investigation, but was engaged in the examination of witnesses, when said committee was informed that the said Belknap had resigned as Secretary of War, by resignation in writing, under his hand, addressed and delivered to the President of the United States, and that the President of the United States had accepted the said resignation by acceptance in writing, under his hand, indorsed upon the said written resignation; that said committee received the said information during and before the completion of the said pretended investigation into the alleged facts in that behalf, to wit, at 11 o'clock in the forenoon of the 2d day of March, A.D. 1876, and that thereupon the said committee declared that they, the said committee, had no further duty to perform in the premises.

And this the said Belknap is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the said impeachment against him, the said Belknap.

VI

And said Belknap, as to said second replication of the House of Representatives of the United States, secondly above pleaded, further saith that the said House of Representatives ought not, by anything in that replication alleged, to have or maintain said impeachment against him, said Belknap, because he says that, although true it is that he did resign his position as Secretary of War on the 2d day of March, A. D. 1876, at 10 o'clock and 20 minutes in the forenoon of that day, at the city of Washington, in the District of Columbia, by a resignation in writing, under his hand, addressed to and then and there delivered to the President of the United States, and the President of the United States did then and there accept said resignation, by acceptance in writing, under his hand, then and there by him indorsed upon said written resignation, nevertheless it is not true, as alleged in that replication, that he, said Belknap, resigned his said position with intent to "evade" any proceedings of said House of Representatives to impeach him, said Belknap; but, on the contrary thereof, he avers the fact to be that a standing committee of said House, known as the Committee on the Expenditures of the War Department, without any authority from or direction of said House of Representatives to examine, inquire, or investigate in regard to the matters and things set forth in said articles as official misconduct of him, said Belknap, had examined one Marsh, and he had made a statement to said committee, which said statement, if true, would not support articles of impeachment against him, said Belknap, but which said statement was of such a character in respect to other persons, some of whom had been and one of whom was so nearly connected with him, said Belknap, by domestic ties as greatly to afflict him, said Belknap, and make him willing to secure the suppression of so much of said statement as affected such other persons at any cost to himself, therefore he, said Belknap, proposed to said committee that if said committee would suppress that part of said statement which related to said other persons he, said Belknap, though contrary to the truth, would admit the receipt by him, said Belknap, of all the moneys stated by said Marsh to have been received by him from one Evans, mentioned in said statement, and paid over by said Marsh to any other person or persons, but said committee declined to accede to said proposition, and Hon. Hiester Clymer, chairman of said committee, then declared to said Belknap that he, said Clymer, should move in the said House of Representatives upon the statement of said Marsh, for the impeachment of him, said Belknap, unless the said Belknap should resign his position as Secretary of War before noon of the next day, to wit, March the 2d, A. D. 1876; and said Belknap regarding this statement of said Clymer, chairman as aforesaid, as an intimation that he, said Belknap, could, by thus resigning, avoid the affliction inseparable from a protracted trial in a forum which would attract the greatest degree of public attention and the humiliation of availing himself of the defense disclosed in said statement itself which would cast blame upon said other persons, he yielded to the suggestion made by said Clymer, chairman as aforesaid, believing that the same was made in good faith by

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the said Clymer, chairman as aforesaid, and that he, said Belknap, would, by resigning his position as Secretary of War, secure the speedy dismissal of said statement from the public mind, which said statement, though it involved no criminality on his part, was deeply painful to his feelings, and did resign his said position as Secretary of War, as hereinbefore stated, at 10 o'clock and 20 minutes in the forenoon of the 2d day of March, A. D. 1876; and at 11 o'clock in the forenoon of the day and year last aforesaid he, said Belknap, caused said committee to be notified of his said resignation and of the acceptance thereof by the President of the United States aforesaid; all of which was in pursuance and in consequence of the said suggestion so made by said Clymer; and thereupon said committee declared that they, the said committee, had no further duty to perform in the premises. And he, said Belknap, submits that, while said House of Representatives claims that said Clymer was acting on its behalf in said pretended examination of said Marsh, said House ought, in honor and in law, to be estopped to deny that said Clymer was also acting on behalf of said House in suggesting the resignation of him, said Belknap, as aforesaid, and ought not to be heard to complain of a resignation thus induced.

And this he, the said Belknap, is ready to verify. Wherefore he prays judgment if the said House of Representatives ought to have or maintain the impeachment against him, the said Belknap.

WM. W. BELKNAP.

The President pro tempore then said:

This rejoinder will be considered duly filed, if there be no objection. The Secretary will now read the surrejoinder of the House of Representatives to the rejoinder of William W. Belknap.

The Secretary read as follows:

In the Senate of the United States sitting as a court of impeachment

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP

By the House of Representatives of the United States, April 25, 1876

The House of Representatives of the United States, in the name of themselves and of all the people of the United States, say that the said first replication to the plea of the said William W. Belknap to the articles of impeachment exhibited against him as aforesaid, and the matters therein continued, in manner and form as the same are above set forth and stated, are sufficient in law for the said House of Representatives to have and maintain the said articles of impeachment against the said William W. Belknap, and that the Senate sitting as a court of impeachment has jurisdiction to hear, try, and determine the same; and the House of Representatives are ready to cerify and prove the same, as the Senate sitting as a court of impeachment shall direct and award: Wherefore, inasmuch as the said William W. Belknap hath not answered the said articles of impeachment or in any manner denied the same, the said House of Representatives, for themselves and for all the people of the United States, pray judgment thereon according to law.

II

And the said House of Representatives as to the first and second subdivisions of the rejoinder to the second replication of the House of Representatives to the plea of the defendant to the said articles of impeachment, wherein the said defendant demands trial according to law, the said House of Representatives, in behalf of themselves and all the people of the United States, do the like; and as to the third, fourth, fifth, and sixth subdivisions of the rejoinder of the said defendant to the said second replication, they say that the said House of Representatives, by reason of anything by the said defendant in the last-named subdivisions of said rejoinder above alleged, ought not to be barred from having and maintaining the said articles of impeachment against the said defendant, because they say that, reserving to themselves all advantage of exception to the insufficiency of the said subdivisions of said rejoinder to said second replication, they deny each and every averment in said several rejoinders to said second replication contained, or either of them, which denies or traverses the acts and intents charged against said defendant in said second replication, and they reaffirm the truth of the matters stated therein; and this the said House of Representatives pray may be inquired of by the Senate sitting as a court of impeachment.

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Wherefore the said House of Representatives, in the name of themselves and of all the people of the United States, pray judgment thereon according to law.

MICHAEL C. KERR,
Speaker of the House of Representatives.
GEO. M. ADAMS,
Clerk of the House of Representatives.

The President pro tempore said:

The surrejoinder will be considered as duly filed also. The Senate sitting for the trial is now ready to hear the parties.

Mr. Carpenter, of counsel for the respondent, next closed the issue of fact on the plea to jurisdiction by submitting the following similiter:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

Upon articles of impeachment of the House of Representatives of the United States of America of high crimes and misdemeanors.

And the said Belknap, as to the surrejoinders of said House of Representatives to the third, fourth, fifth, and sixth rejoinders of the said Belknap to the second replication of said House of Representatives above pleaded, whereof said House of Representatives have demanded trial, the said Belknap doth the like.

WILLIAM W. BELKNAP.

Mr. Manager Lord submitted [34] a motion relating to the giving of evidence on questions pertaining to the plea to the jurisdiction and to the carrying on of the trial as to the main issue.

2456. Belknap's impeachment continued.

The Senate declined to grant the motion of the counsel for Belknap that the trial be continued to a later date.

The Senate declined to consult the managers before passing on the application of respondent for a continuance of the Belknap trial.

The Senate in secret session passed on the motion for a continuance in the Belknap trial.

After this motion had been submitted by Mr. Lord, Mr. Matt. H. Carpenter, of counsel for the respondent, offered [35] this motion:

That the further hearing and trial of this impeachment of William W. Belknap be continued to the first Monday of December next.

In argument in support of this the counsel for the respondent urged that in the existing political excitement a fair trial was not likely to result. The precedents of the Blount and Peck impeachments were cited to justify the postponement.

The Senate having retired for consultation (of which consultation the debates were not public and not reported), Mr. Edmunds moved that the motion for postponement be denied.

Mr. John Sherman of Ohio, moved to amend by substituting the following:

That the President pro tempore ask the managers if they desire to be heard on the pending motion of Mr. Carpenter, of counsel for respondent.

This motion was disagreed to, yeas 28, nays 31.

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[34] Senate Journal, p. 920; Record of trial, p. 9.
[35] Senate Journal, pp. 920–923; Record of trial, pp. 10–15.

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Mr. Edmunds's motion, that the request for a postponement be not granted, was agreed to, yeas 59, nays 0.

Thereupon the Senate returned to their Chamber and the President pro tempore said:

The Presiding Officer is directed to state to the counsel for the respondent that their motion is denied.

2457. Belknap's impeachment continued.

The Senate overruled the motion of the managers that the evidence on the question of the jurisdiction of the Senate in the Belknap case be given before the arguments relating thereto.

The Senate determined in the Belknap case to hear first the question of law as to jurisdiction.

The Senate denied the motion of the managers in the Belknap case to fix the time of answer and trial on the merits before decision on the demurrer.

The Senate ordered a discussion in argument on the right of the House to allege in the replication matters not touched in the articles.

References to American and English precedents in determining order of deciding the question of jurisdiction in the Belknap case.

The Senate in secret session determined on the same time of having the arguments as to jurisdiction in the Belknap trial.

Thereupon the motion proposed previously by Mr. Manager Lord was taken up.[36]

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

On motion of the managers.

Ordered, That the evidence on the questions pertaining to the plea to the jurisdiction of this court be given before the arguments relating thereto are heard, and if such plea is overruled that the defendant be required to answer the articles of impeachment within two days, and the House of Representatives to reply if they deem it necessary within two days; and that the trial proceed on the next day after the joining of issue.

In support of this Mr. Manager Lord argued:

With the permission of the court, Mr. President, I will give the following reasons why we think this order should be entered:

All of the issues of law and fact relate to the question of jurisdiction. It is but a single question, upon which the Senate can make but one decision, and the facts pertaining thereto should be proved before the arguments, so that the questions of law and of fact may be considered and decided at the same time. This is the course in all legal tribunals in which questions of law and fact are decided by the same judge or judges.

Now let me refer to some authorities on this point:

"In cases where the jury are to decide on both the law and the fact a general verdict may be rendered on the whole matter." (Starkie's Law of Libel, p. 203.)

In the case of Baylis *v.* Laurance (11 Adolphus and Ellis, 920), referred to by Starkie on the same page, it was held that the law was the same in regard to both civil and criminal cases.

The same author, page 580, states:

"A jury sworn to try the issue may give the general verdict of guilty or not guilty upon the whole matter put in issue, * * * and shall not be required or directed by the court or judge * * * to find the defendant or defendants guilty merely on the proof of the publication."

[36] Senate Journal, pp. 920–926; Record of trial, pp. 9, 10, 15–19.

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When by the Constitution the sole power to try impeachments was conferred upon the Senate without any direction as to the mode of procedure, it must have been intended that the rules governing the House of Lords when sitting as a court of impeachment, so far as applicable, should control the Senate sitting as a court of impeachment.

Mr. Erskine, before the Court of King's Bench, in the case of the Dean of Asaph, in regard to the abolition of the king's court and the distribution of its powers, says:

"The barons preserved that supreme superintending jurisdiction which never belonged to the justices, but to themselves only as the jurors in the king's court."

And in a note to his argument found in Goodrich's British Eloquence, page 659, it is said:

"During a trial before the House of Peers every peer present on the trial law has always been judge both of the law and the fact; hence no special verdict can be given on the trial of a peer."

Bouvier, in his Law Dictionary, volume 2, page 540, says:

"A special verdict is one by which the facts of the case are put on the record and the law is submitted to the judges."

See also Bacon's Abridgment, Verdict, D, A.

A special finding or verdict is therefore only necessary when the questions of fact are found in one tribunal and the law is applied by another.

But there is a direct authority on this question from a court of impeachment only second in dignity to this high tribunal. The court of impeachment of the State of New York is composed of the president of the senate, who is the lieutenant-governor, of the senators, and of the judges of the court of appeals. In the case of the People of the State of New York against George G. Barnard, then one of the justices of the supreme court (see vol. 1, pp. 106–108), the respondent interposed a plea to the jurisdiction on the ground that the articles of impeachment were not adopted by the assembly by a vote of the majority of all the members elected thereto, as required by the constitution. A replication to the plea was filed that the assembly did impeach the respondent by a vote of a majority of all the members elected thereto. Witnesses were then examined in regard to this question on both sides; counsel were heard for the respondent in support of the plea, and for the prosecution in opposition; after which the president stated that the question before the court was whether the plea of the respondent should be sustained. Upon the decision not to sustain the plea replications were filed, and the trial on the merits proceeded.

This precedent sustains the motion in this case more fully for the reason that the respondent in that case more than a month before he interposed the plea to the jurisdiction had pleaded to the merits by filing a general answer denying each and every allegation in the articles of impeachment; but discovering a month afterwords, as he though, that the articles of impeachments had not been properly presented, on the ground that a majority of the members elected to the assembly had not concurred therein, he put in a plea to the jurisdiction, and the proceedings were had which I have already stated.

Therefore we submit to this honorable court that the managers, by asking the entry of this order, have suggested the proper method of trial.

In opposition, on April 28, Mr. Carpenter, of counsel for the respondent, argued:

The first part of this order, "That the evidence on the questions pertaining to the jurisdiction of this court be given before the arguments relating thereto are heard," we have no objection to. It is a matter of total indifference to us what is the order which the Senate may make in that particular. Whether the testimony shall be taken and the argument on the facts and the law in regard to the jurisdiction of the court be heard together, or whether they shall be proceeded with at different times is a matter of indifference to us.

To the residue of the order, however, we do seriously object, upon several grounds. In the first place, we object to the managers controlling this case on both sides. We are perfectly willing that they should ask such orders as they please for their own government and their own pleadings; but we object to their fixing or asking any order in regard to our pleadings. This part of the order is:

"And if such plea is overruled, that the defendant be required to answer the articles of impeachment within two days."

I suppose that means answer the articles on the merits.

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"And the House of Representatives to reply, if they deem it necessary, within two days; and that the trial proceed on the next day after the joining of issue."

I submit to this honorable court that a proper reply to the managers of the House in regard to this part of the proposed order would be the famous reply which Coke made to the King: "When the question arises and is debated, I will do what is fit and proper for a judge to do; and further, I decline to pledge myself to Your Majesty." When this plea to the jurisdiction shall be disposed of, the defendant may demur to the articles of impeachment, or may not, as he shall be advised; and what will be the circumstances of this court, or of the counsel, or even of the managers, who, although numerous, are not incorporated and are still mortal, this court can not to-day determine. They may not want to make their reply to whatever we may say so speedily as they now think.

In the next place, if the court please, while, as I say, we shall not attempt to make any delays in this case beyond what are absolutely necessary, the argument of the question of the jurisdiction of this court can not be made properly on the day indicated in this order.

Mr. Carpenter then gave reasons, such as the preoccupation of counsel in other duties, the difficulty in getting books of authority, etc., to show why the arguments should be delayed.

Mr. Roscoe Conkling, of New York, proposed the following:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office. The motion that testimony be heard touching the exact time of such resignation, and touching the motive and purpose of such resignation, is reserved without prejudice till the question above stated has been considered.

In opposition to the resolution proposed by Mr. Conkling, Mr. Manager Lord argued:

Mr. President and Senators: It seems to me that under the authorities adduced yesterday such a course of procedure would be protracting the trial and entirely unnecessary. Several authorities were produced yesterday to show that a special finding or verdict is only necessary when the questions of fact are found in one tribunal and the law is applied by another. This question of jurisdiction is a single question, and it ought not to be divided and subdivided. The evidence should be in before the judgment of the court is taken on the question of jurisdiction; and this I understand the other side concede. Very great embarrassment might arise; very great delays might ensue from dividing this question. I cited yesterday an authority in the State of New York, to which I will again call the attention of the Senators—the Barnard case.

The court of impeachment in that State, composed of the president of the senate, the lieutenant-governor, the senators, and the judges of the court of appeals, had precisely this question before them. A plea to the jurisdiction was interposed, as follows:

"And the said respondent, in his own proper person and by his counsel, John H. Reynolds and William A. Beach, comes and says that this court ought not to have or take further cognizance of the articles of impeachment, or any or either of them, presented in this court against him, because, he says that the said articles of impeachment were not, nor were any nor was either of them, adopted by the assembly of this State by a vote of a majority of all the members elected thereto, as required by section 1 of article 6 of the constitution of this State."

A replication was put into that plea, asserting—

"That it is not true that the articles of impeachment now presented against the said respondent do not appear to be and are not articles of impeachment adopted by the assembly of the State, but that the said articles do appear to be and are articles of impeachment adopted by the said assembly."

Then Edward M. Johnson and Charles R. Dayton were called and sworn on the part of the respondent. Hon. C. P. Vedder and Hon. Thomas G. Alvord were called and sworn on the part of the prosecution, these being respectively members or officers of the house. Counsel then argued the case. Messrs. Beach and Reynolds, of counsel for respondent, and Mr. Van Cott, of counsel for the prosecution.

The president stated that the question before the court was whether the plea of the respondent should be sustained.

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Mr. Lewis moved that the chamber be cleared for private consultation.

The president put the question whether the court would agree to said motion, and it was determined in the affirmative.

The president put the question whether the court would sustain said plea of the respondent, and it was determined in the negative, as follows:

Chief Judge Church, of the court of appeals; Judge Allen, also of the court of appeals, and Senator Murphy in that case voted in the affirmative; the other Senators in the negative. I refer to this case of The People *v.* Barnard to show that in a court of impeachment composed of the senators of the State of New York and the pudges of the court of appeals of that State the precise order was taken for which we move; the evidence was in before the question of jurisdiction was passed upon. Why should we be driven to one single question when there are three or four, and all of them, I apprehend, exceedingly important questions in this case? Perhaps in one view it may be the question of the case whether the defendant resigned for the purpose of evading this impeachment. Why should we try one question at one time and try another question at another time?

Mr. Carpenter argued for the respondent:

Mr. President and Senators, the pleadings proper in this case consist of the articles of impeachment, the plea to the jurisdiction, and the first replication of the House of Representatives, to which there is a demurrer by us and a joinder by the managers. Strictly speaking, that is the only issue that could be made in this case. The honorable managers, however, saw fit, without asking leave, to file two replications, instead of one, to our plea. We of course did not care how fully they went into this question; we were ready to follow them in disregard of technical pleading.

I never heard of a case in a court where a single plea had led to an issue of law and fact or where a declaration or any proceeding whatever was followed by two issues, one of law and one of fact, that the court did not always first dispose of the question of law. That being disposed of, the question of fact may or may not be necessary to be inquired into. While on the part of Mr. Belknap we make no objection to this proceeding, its regularity is a question for the court to determine. It seems to me that the more regular proceeding is that indicated by the order offered by the Senator from New York, that the law of this question should be first settled. If we had been captious about pleading, and had moved the court to strike out this second replication, which is drawn not according to common-law form, but according to the free-and-easy style of the New York code, this court would have stricken it out as having been improprely filed, permission not having been granted to reply double. We did not object because we did not care for forms, and we followed them after their kind in our reply to their pleas. But certainly the course most in harmony with the method pursued in courts of law would be to settle the law upon this point first. If the Senate has no jurisdiction over a man who not in office at the time the impeachment commences, that ends the question. That is a mere question of law; and we shall contend, of course, that any officer of the Government has a perfect right to resign at any moment and that the motives of a man's resignation cannot affect the legal consequences which follow the act of resignation. The Supreme Court of the United States has held where a citizen who wishes to have a litigation with a citizen of his own State moves into another State for the express purpose of giving the Federal courts jurisdiction, that is no objection to the jurisdiction; that a man may change his residence from one State to another for the purpose of obtaining a footing in a Federal court, as well as he may change it for the purpose of improving his health or his financial condition.

I do not regard the issues made as of any substantial consequences to this case. We care nothing about them. We are willing to try them or not try them, as the court directs. But the question is whether this man was in office at the time he was impeached by the House of Representatives? That is fully presented by the articles, by our plea to the jurisdiction, and by the first, which is the only regular, replication on the part of the House and our demurrer thereto. If the Senate shall be of opinion that none but a person in office can be impeached, of course that ends this proceeding. At all events, the method suggested by the order last offered is the method which should be pursued in a court of law. It will be borne in mind that we interposed the first demurrer, and are therefore entitled to open and close in the argument.

The Senate having retired for consultation (of which the proceedings, but not the debates, are reported in the Journal and record of

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trial), consideration was first given to a motion by Mr. Edmunds to strike out the second sentence of the pending order and insert:

And that the managers and counsel in such argument discuss the question whether the issues of fact are material.

Mr. Allen G. Thurman, of Ohio, moved the following amendment, which was agreed to:

Add to the words proposed by Mr. Edmunds to be inserted the following:
And whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

Then Mr. Edmunds's motion, as amended, was agreed to.

Mr. Thurman moved further to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting:

That the Senate will first hear the evidence on the issues of fact relating to the question of jurisdiction, and after hearing the same will fix a time for hearing the argument upon the questions of law and fact relating to such jurisdiction.

The amendment was rejected.

Thereupon Mr. Conkling's resolution, as amended, was agreed to, as follows:

Ordered, That the Senate proceed first to hear and determine the question whether W. W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office; and that the managers and counsel in such argument discuss the question whether the issues of fact are material, and whether the matters in support of the jurisdiction alleged by the House of Representatives in the pleadings subsequent to the articles of impeachment can be thus alleged if the same are not averred in said articles.

2458. Belknap's trial continued.

The Senate by rule determined the order and time of arguments, and the numbers of counsel and managers to speak, on the plea to jurisdiction in the Belknap trial.

Thereupon Mr. Edmunds moved the following:

Ordered, That the hearing proceed on the 4th day of May, 1876; and that three of the managers and three of the counsel for the respondent be heard thereon, as follows: One counsel for the respondent shall open and shall be followed by one manager, and he shall be followed by one counsel for the respondent, who shall be followed by two managers, and one counsel for the respondent shall close the argument; and that such time be allowed for argument as the managers and counsel may desire.

Motions to amend by changing the date from the 4th to the 15th, 16th, and 8th were severally disagreed to, the last-named date, the 8th, being negatived by a vote of yeas 23, nays 32.

Mr. Conkling then moved to amend the resolution by striking out all after the word "resolved" and in lieu thereof inserting—

That the hearing proceed on the 4th day of May, 1876, at 12 o'clock and 30 minutes p.m.; that the opening and close of the argument be given to the respondent; that three counsel and three managers may be heard in such order as may be agreed upon between themselves, and that such time be allowed for argument as the managers and counsel may desire.

After debate,

The amendment was agreed to.

The resolution of Mr. Edmunds, as amended, was then agreed to.

Thereupon the Senate returned to the Senate Chamber and the President pro tempore directed the two orders to be reported.

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On May 4,[37] the next session of the Senate sitting for the trial, Mr. Carpenter, of counsel for the respondent, suggested an adjournment until May 15. Thereupon Mr. John Sherman, of Ohio, offered this order:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p.m., and that the argument of the question of jurisdiction be continued to eight hours on each side.

Mr. Aaron A. Sargent, of California, moved to amend by striking out that portion of the order limiting the time of the arguments, and the amendment was agreed to, without division. The order as amended was then disagreed to, yeas 21, nays 40.

Thereupon Mr. Sherman offered the following:

Ordered, That this court adjourn until Monday, May 15, at 12 o'clock and 30 minutes p.m.; and that the argument of the question of jurisdiction be confined to nine hours on each side, to be divided between them as the managers and counsel may agree.

This order was disagreed to, yeas 22, nays 38.

The arguments thereupon began [38] and continued during May 5 and 6 and for a portion of May 8. Mr. Black, of counsel for the respondent, opened, and was followed by Mr. Manager Lord, who was followed by Mr. Carpenter, of counsel for the respondent. Messrs. Managers Knott, Jenks, and Hoar followed Mr. Carpenter, and then Mr. Black closed for the respondent. On May 6 [39] Mr. Manager Knott, after speaking some time, stated that he was unable to proceed further, on account of indisposition, and asked the indulgence of the Senate to conclude his argument on Monday, May 8. This leave was granted; and Mr. Manager Jenks continued the argument on May 6.

2459. Belknap's trial continued.

The Senate decided that it had jurisdiction to try the Belknap impeachment case, although the respondent had resigned the office.

In the Belknap case the Senate decided that respondent's plea in demurrer was insufficient, and that the articles were sufficient.

While deliberating on the question of jurisdiction in the Belknap case the Senate notified the managers and counsel that their attendance was not required.

In the Belknap trial the Senate declined to permit the debates in secret session to be recorded.

Each Senator was permitted to file a written opinion on the question of jurisdiction in the Belknap trial.

After the conclusion of the arguments, on May 8,[40] it was

Ordered, That until further notice the attendance before the Senate, sitting for the trial of the impeachment, of the managers and the respondent will not be required.

Thereupon the Senate adjourned to Monday, May 15.

From May 15 to May 29 [41] the Senate in secret session deliberated on the pending question. The record of the proceedings only appear in the Journal; but none of the speeches are printed. On May 16 [42] Mr. Wil-

[37] Senate Journal, pp. 928, 929; Record of trial, pp. 27, 28.
[38] Senate Journal, pp. 929–931; Record of trial, pp. 28–72.
[39] Senate Journal, p. 930.
[40] Senate Journal, p. 932; Record of trial, p. 72.
[41] Senate Journal, pp. 932–947; Record of trial, pp. 72–77.
[42] Senate Journal, p. 934; Record of trial, p. 73.

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liam B. Allison, of Iowa, proposed a motion "that the consultations and opinions expressed in secret session be taken down by the reporters and printed in confidence for the use of Senators;" but on the next day, when the motion was called up, the Senate refused to consider it.

On May 29,[44] on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That each Senator be permitted to file his opinion in writing upon the question of jurisdiction in this case on or before the 1st day of July, 1876, to be printed with the proceedings in the order in which the same shall be delivered, and the opinions pronounced in the Senate shall be printed in the order in which they were so pronounced.

Also the following resolutions, proposed by Mr. Allen G. Thurman, of Ohio, were, after minor amendments, agreed to,[44] the first by a vote of yeas 37, nays 29: the second by a vote of yeas 45, nays 4, and the third by 35 yeas to 22 nays:

Resolved, That in the opinion of the Senate William W. Belknap, the respondent, is amenable to trial by impeachment for acts done as Secretary of War, notwithstanding his resignation of said office before he was impeached.

Resolved, That the House of Representatives and the respondent be notified that on Thursday, the 1st day of June, 1876, at 1 o'clock p.m., the Senate will deliver its judgment, in open Senate, on the question of jurisdiction raised by the pleadings, at which time the managers on the part of the House and the respondent are notified to attend.

Resolved, That at the time specified in the foregoing resolution the President of the Senate shall pronounce the judgment of the Senate as follows: "It is ordered by the Senate, sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught;" which judgment thus pronounced shall be entered upon the Journal of the Senate sitting as aforesaid.

Before the second resolution was agreed to Mr. Isaac P. Christiancy, of Michigan, proposed the following resolution, but withdrew it after debate:

Whereas the Constitution of the United States provides that no person shall be convicted on impeachment without the concurrence of two-thirds of the members present; and whereas more than one-third of all the members of the Senate have already pronounced their conviction that they have no right or power to adjudge or try a citizen holding no public office or trust when impeached by the House of Representatives; and whereas the respondent, W. W. Belknap, was not when impeached an officer, but a private citizen of the United States, and of the State of Iowa; and whereas said Belknap has, since proceedings of impeachment were commenced against him, been indicted and now awaits trial before a judicial court for the same offenses charged in the articles of impeachment, which indictment is pursuant to a statute requiring in case of conviction (in addition to fine and imprisonment) an infliction of the utmost judgment which can follow impeachment in any case, namely, disqualification ever again to hold office:

Resolved, That in view of the foregoing facts it is inexpedient to proceed further in the case.

On June 1,[45] in open session of the Senate, sitting for the trial, the President pro tempore announced the decision on the question of jurisdiction:

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[44] Senate Journal, pp. 943–947; Record of trial, pp. 76, 77.

[44] For the arguments on the questions involved in these resolutions, see section 2007 of this volume.

[45] Senate Journal, p. 947; Record of trial, pp. 158–161.

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On the question of jurisdiction raised by the pleadings in this trial, it is ordered by the Senate sitting for the trial of the articles of impeachment preferred by the House of Representatives against William W. Belknap, late Secretary of War, that the demurrer of said William W. Belknap to the replication of the House of Representatives to the plea to the jurisdiction filed by said Belknap be, and the same hereby is, overruled; and, it being the opinion of the Senate that said plea is insufficient in law and that said articles of impeachment are sufficient in law, it is therefore further ordered and adjudged that said plea be, and the same hereby is, overruled and held for naught.

2460. Belknap's impeachment continued.

The question of jurisdiction being settled, the Senate gave Secretary Belknap ten days to answer on the merits.

The Senate provided that in default of answer from respondent on the merits, the Belknap trial should proceed as on a plea of not guilty.

The Senate fixed the time of proceedings with the evidence in the Belknap trial before respondent's answer on the merits.

In the Belknap trial managers and counsel were directed to furnish one another with their lists of witnesses.

Thereupon Mr. William Pinkney Whyte, of Maryland, proposed the following:

Ordered, That W. W. Belknap is hereby ordered to plead further or answer the articles of impeachment within ten days from this date.

Mr. Francis Kernan, a Senator from New York, proposed this amendment:

Resolved, That in default of an answer within ten days by the respondent to the articles of impeachment, the trial shall proceed as on a plea of not guilty.

Mr. John Sherman, of Ohio, proposed this:

Ordered, That this court adjourn until Tuesday next, and in the meantime the defendant have leave to plead, answer, or demur herein.

The Senate, sitting for the trial, having adjourned to June 6,[46] on that day[47] the order proposed by Mr. Whyte came up for consideration, and on motion of Mr. Sherman it was amended by striking out the words "is hereby ordered to plead further," and inserting the words "have leave to plead further."

Thereupon, at the suggestion of Mr. Manager Scott Lord, Mr. Allen G. Thurman, a Senator from Ohio, proposed to amend by adding thereto:

And that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

This amendment was agreed to, yeas 35, nays 7.

Thereupon, after further amendment at the suggestion of Mr. Whyte, the order was agreed to by a vote of yeas 33, nays 4, in this form:

Ordered, That W. W. Belknap have leave to answer the articles of impeachment within ten days from this date; and that, in default of an answer to the merits within ten days by respondent to the articles of impeachment, the trial shall proceed as upon a plea of not guilty.

Thereupon Mr. Manager Lord proposed the following:

[46] Senate Journal, pp. 948–951; Record of trial, pp. 162–169.
[47] On this day also counsel for respondent raised a question affecting the recently made decision as to the jurisdiction.

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Resolved, That on the 6th day of July, 1876, the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits in the trial of this case.

Thereupon several propositions were made as to the time of proceeding with the evidence, the counsel for the respondent asking for a much longer time. Mr. Francis M. Cockrell, of Missouri, proposed June 19 instant [this day being the 6th], but the proposition was disagreed to, yeas 19, nays 27. A proposition made by Mr. George F. Edmunds, of Vermont, fixing the date as July 6 was agreed to, yeas 36, nays 9. Then the order was agreed to as follows:

Ordered, That on the 6th day of July, 1876, at 1 o'clock p.m., the Senate sitting as a court of impeachment will proceed to hear the evidence on the merits of the trial in this case.

Then it was further

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

Thereupon the Senate, sitting for the trial, adjourned to June 16, that day being selected in order to provide for the answer, which was to be filed within ten days, if at all.

2461. Belknap's impeachment continued.

In the Belknap trial respondent declined to plead on the merits, but filed a protest against the continuance of the trial.

In the Belknap trial the right of the Senate to take jurisdiction by a majority vote was the subject of protest.

A protest filed on behalf of respondent in the Belknap trial was signed by respondent and his counsel.

The Senate, after debate and close division, permitted the filing of a protest by respondent in the Belknap trial.

The Senate considered in secret session the protest of respondent in the Belknap impeachment.

On June 16,[48] Mr. Jeremiah S. Black, of counsel for the respondent, announced that they declined to put in any plea, but asked that this paper be filed:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES OF AMERICA *v.* WILLIAM W. BELKNAP.

And now, to wit, this 16th day of June, 1876, the said William W. Belknap comes into court, and being called upon to plead further to the said articles of impeachment, doth most humbly and with profoundest respect represent and show to this honorable court that on the 17th day of April last past he did plead to the said articles of impeachment, and in his said plea did allege that at the time when the House of Representatives of the United States ordered the said impeachment, and at the time when the said articles of impeachment were exhibited at the bar of the Senate against him, he, the said Belknap, was and ever thereafter had been not a public officer of the United States, but a private citizen of the United States and of the State of Iowa; and that the plea aforesaid and all the matters and things therein contained were by him, said Belknap, fully verified by proofs, namely, by admissions of the said House of Representatives before said court; and the said Belknap further represents and shows to the court here that the truth and sufficiency of the plea pleaded by him as aforesaid were thereupon debated by the managers of the

[48] First session Forty-fourth Congress, Senate Journal, pp. 952, 954, 955; Record of trial, pp. 169–173.

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said House of Representatives and the counsel of this respondent, and thereupon submitted to this court for its determination and judgment thereon; and that such proceedings were thereupon had in this court on that behalf in this cause; that afterwards, to wit, on the 29th day of May last past, the members of this court, to wit, the Senators of the United States sitting as a court of impeachment as aforesaid, did severally deliver their several judgments, opinions, and votes on the truth and sufficiency in law of the said plea, when and whereby it was made duly to appear that only thirty-seven Senators concurred in pronouncing said plea insufficient or untrue; whereas twenty-nine Senators sitting in said court, by their opinions and votes, affirmed and declared their opinion to be that said plea was sufficient in law and true in point of fact; so that the said Belknap in fact saith that, on the day and year last aforesaid, twenty-nine Senators sitting in said court declared therein that the said Belknap having ceased to be a public officer of the United States by reason of his resignation of the office of Secretary of War of the United States before proceedings in impeachment were commenced against him by the House of Representatives of the United States, the Senate can not take jurisdiction of this cause; and that seven Senators did not vote upon said question, and only thirty-seven Senators, by their votes, declared their opinion to be that the Senate could take jurisdiction of said cause. And afterwards thirty-seven Senators sitting in said court, and no more, concurred in a resolution declaring that "in the opinion of the Senate William W. Belknap is amenable to trial on impeachment for acts done as Secretary of War, notwithstanding his resignation of said office," and that twenty-nine of said Senators sitting in said court, by their votes, affirmed and declared their opinion to be to the contrary thereof. And afterwards, on the day and year last aforesaid. It was proposed in said court that the President pro tempore of the said Senate should declare the judgment of the said Senate, sitting as aforesaid, to be that said plea of said respondent should be held for naught, and a vote was taken upon said proposition; and, as said vote showed, two-thirds of the said Senators present did not concur therein; but, on the contrary thereof, only thirty-six Senators did not concur therein, and twenty-seven Senators then and there present, and voting on said proposition, did by their votes dissent from and vote against said proposition. All of which appears more fully and at large upon the record of this court in this cause, to which record he, said Belknap, prays leave to refer.

Therefore the said Belknap, referring to the Constitution of the United States, article 1, section 3, clause 6, which provides that "no person shall be convicted without the concurrence of two-thirds of the Members present" (meaning on trial on impeachment), avers that his said plea has not been overruled or held for naught by the Senate sitting as aforesaid, no such judgment having been concurred in by two-thirds of the Senators sitting in said court and voting thereon; but, on the contrary thereof, as the vote aforesaid fully shows, the said plea of the said respondent was sustained, and its truth in fact and sufficiency in law duly affirmed by the said Senate sitting as aforesaid, more than one-third of the Senators of said Senate, sitting as aforesaid, having by their votes so declared, to wit, twenty-seven Senators as aforesaid, and said twenty-seven Senators having by their votes declared and affirmed their opinion to be that said plea of said respondent was true in fact, and was sufficient in law to prevent the Senate sitting as aforesaid from taking further cognizance of said articles of impeachment.

Wherefore the respondent avers that he has already been substantially acquitted by the Senate sitting as aforesaid; and that he, the said respondent, is not bound further to answer said articles of impeachment; the said order requiring this respondent to answer over not having been made with the concurrence of two-thirds of the said Senators sitting as aforesaid and voting upon the question of the passage of said order; and said order having been passed with the concurrence only of less than two-thirds of the said Senators sitting as aforesaid and voting on the question of making and passing said order, the said order ought not to have been entered of record as an order of said court of impeachment in this cause; and said order appearing upon the whole record of said cause to be null and void, as an order of said court.

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And the said respondent prays the court now here, as has before formally moved said court, to vacate said order; and the said respondent hereby prays said court that he may be hence dismissed.

WILLIAM W. BELKNAP.
MATT H. CARPENTER,
J. S. BLACK,
MONTGOMERY BLAIR,
Of Counsel for said Respondent.

Mr. George F. Edmunds, a Senator from Vermont, objected to the filing of the paper at present, and Mr. Manager Lord entered a formal objection:

Mr. President and Senators, the objection of the managers to filing this paper is that it is in direct contravention of the order of the Senate, as we view it. The order of the Senate was that on this day the respondent should plead to the merits or that the case should go to trial as upon a plea of not guilty. The Senate have not forgotten that the learned counsel who makes this motion stated distinctly in this tribunal at the last hearing that the question now raised could not be settled until the final determination of the case, for it is utterly impossible to tell at this time what the organization of the Senate will be then. The managers then said, and say now, that on this point we are prepared to argue the question at a proper time, but it seems entirely premature to attempt to argue it now, when it is impossible, as I have already said, to tell what the organization of the Senate will be when the verdict is to be taken. How many it will take to make two-thirds of the Members present at that time it is impossible now to tell; and I repeat the counsel stated emphatically that the question could not be determined until then. He now comes here, declines to plead, and asks that this rather extraordinary paper be filed. And we say there is no precedent for filing it, there is no reason for filing it, and it is a violation of the order of the Senate.

Mr. Montgomery Blair, of counsel for the respondent, said:

We wish a formal paper on the records of this body showing to the Senate and to the country the position and attitude we take upon that subject, and we think that now is the proper time. Of course, we do not say that we stand here to prevent the Senate from proceeding to the trial of the facts. We can not do that, because they have already said—and we take it that what they have said they mean—that, if we do not on this occasion file a plea to the merits of this case, they would proceed and put in a plea of the general issue for us themselves; and we expect that now, as my colleague has said to you. All we ask is that this paper, which states formally the attitude that we hold and shall claim to hold to the end of this trial, shall be noted on the records of this body. I think that any impartial tribunal would grant us that liberty of claiming the right to argue as matter of law that this court has already decided this question in its action upon the special plea heretofore put in. I do not call for any argument from the managers now or at any time hereafter (if they choose to permit it) upon this question.

On June 19,[49] in secret session, Mr. John Sherman, a Senator from Ohio, submitted an order, of which the first portion was as follows:

Ordered, That the paper presented by the defendant on the 16th instant be filed in this cause.

Mr. Allen G. Thurman, of Ohio, moved to amend by inserting after the word "be" the word "not." The amendment was disagreed to, yeas 24, nays 24.

Thereupon the order as proposed by Mr. Sherman was agreed to, yeas 26, nays 24. So the paper was ordered filed.

[49] Senate Journal, pp. 954, 955; Record of trial, pp. 172, 173.

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2462. Belknap's impeachment continued.

After settling the question of jurisdiction, the Senate overruled respondent's motion for a continuance of the Belknap trial.

The Senate determined that an impeachment might proceed only while Congress was in session.

On June 17 [50] Mr. Black, of counsel for the respondent, proposed this order:

Ordered, That this case be now continued until some convenient day in the month of November.

On June 19 the Senate, in secret session, considered the order, and on motion of Mr. Allen G. Thurman, of Ohio, it was, without division,

Ordered, That the application of the respondent for postponement of the time for proceeding with trial be overruled.

On June 16 [51] Mr. Manager Lord had proposed the following:

Ordered, That the respondent, W. W. Belknap, shall not be allowed to make any further plea or answer to the articles of impeachment preferred against him on the part of the House of Representatives, but that the future proceedings proceed as upon a general plea of not guilty.

But subsequently he modified it to this form:

Ordered, That W. W. Belknap having made default to plead or answer to the merits within the time fixed by the order of the Senate, the trial proceed as upon a plea of not guilty, in pursuance of the former order.

On June 19 Mr. John Sherman, of Ohio, in secret session, presented an order, the first portion of which provided for the filing of the paper presented by counsel for respondent, and the second portion of which,

Ordered, That * * * the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty.

Mr. William B. Allison, of Iowa, proposed an amendment substituting "19th day of November" for "6th day of July." This was disagreed to, yeas 9, nays 37.

On motion of Mr. Conkling, by a vote of yeas 21, nays 19, the words "*Provided*, That the impeachment can only proceed while Congress is in session" were added.

Then, as amended, the portion of the order as given was agreed to, as follows, by a vote of yeas 21, nays 16:

And the defendant having failed to answer to the merits within ten days allowed by the order of the Senate of the 6th instant, the trial shall proceed on the 6th of July next as upon a plea of not guilty: *Provided*, The impeachment can only proceed while Congress is in session.

2463. Belknap's impeachment continued.

The Senate provided that subpoenas for respondent's witnesses in the Belknap trial should be issued on recommendation of a committee.

An approved number of witnesses for respondent in the Belknap trial were summoned at public expense.

Thereupon Mr. George F. Edmunds proposed the following, which was agreed to [52] by unanimous consent:

[50] Senate Journal, pp. 952–954; Record of trial, pp. 171, 172.
[51] Senate Journal, pp. 952, 954, 959; Record of trial, pp. 170, 173.
[52] Senate Journal, p. 959; Record of trial, p. 174.

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Ordered, That the Secretary issue subpoenas that may be applied for by the respondent for such witnesses to be summoned at the expense of the United States as shall be allowed by a committee, to consist of Senators Frelinghuysen, Thurman, and Christiancy, and that subpoenas for all other witnesses for the respondent shall contain the statement that the witnesses therein named are to attend upon the tender on behalf of the respondent of their lawful fees.

This order was apparently in response to a letter from the Chief Clerk of the Senate, presented on June 16,[53] transmitting a list of witnesses to be summoned on behalf of the respondent, which list had been filed in his office.

2464. Belknap's impeachment continued.

The opening address and presentation of testimony in the Belknap impeachment.

Counsel for respondent made no opening address before presenting testimony in the Belknap trial.

Forms and ceremonies of opening the proceedings of the Senate on a day of the Belknap trial.

The Senate daily informed the House of its readiness to proceed with the Belknap trial.

On July 6,[54] the day set for the trial to proceed, the proceedings opened with the usual formalities. In the Senate the President pro tempore said:

The hour of 12 o'clock having arrived, pursuant to the order of the Senate made on June 19 the legislative and executive business of the Senate will be suspended and the Senate will proceed to the consideration of the articles of impeachment exhibited by the House of Representatives against William W. Belknap, late Secretary of War.

The usual proclamation was made by the Sergeant-at-Arms.

Messrs. Lord, Lynde, McMahon, Jenks, Lapham, and Hoar, of the managers on the part of the House of Representatives, appeared and were conducted to the seats assigned them.

The respondent appeared with his counsel, Messrs. Blair, Black, and Carpenter.

The President pro tempore said:

The Secretary will notify the House of Representatives that the Senate is ready to proceed with the trial and that seats are provided for their accommodation.[55]

The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of William W. Belknap of Monday, June 19, 1876.

The President pro tempore said:

The Senate in trial is now ready to proceed.

Mr. Manager William P. Lynde then made the opening address on behalf of the House of Representatives, after which witnesses were called and sworn, and after examination by the managers were cross-examined by counsel for the respondent.

On July 12[56] the testimony presented by the managers was closed, and the President pro tempore said:

The defense will proceed, the case being closed on the part of the managers.

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[53] Senate Journal, p. 952; Record of trial, p. 170.
[54] Senate Journal, p. 960; Record of trial, pp. 174, 175.
[55] This message was sent daily in accordance with rule. The House, however, had voted not to attend.
[56] Senate Journal, p. 975; Record of trial, p. 256.

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Thereupon at once, without any opening address, the counsel for the respondent began the introduction of testimony.

On July 19 [57] the testimony for the respondent was concluded. The managers announced that they had nothing in rebuttal.

2465. Belknap's impeachment continued.

In the Belknap trial the Senate permitted three managers and three counsel to argue on the final question, in such order as might be agreed on.

The Senate declined to restrict the time of final arguments in the Belknap trial.

In the Belknap trial the closing speech of the final arguments was by one of the managers.

The illness of counsel or managers was certified to as reason for disarranging the order of final arugment in the Belknap trial.

In the Belknap trial the witnesses were discharged before the final arguments.

Thereupon [58] Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an order permitting three of the counsel for the respondent to be heard in final argument instead of two, as provided in Rule XXI.

Mr. George F. Edmunds, a Senator from Vermont, offered this order:

Ordered, That three persons on each side be allowed six hours for summing up, to be arranged between them.

Mr. Roscoe Conkling, a Senator from New York, proposed to amend by striking out all after the word "*Ordered*," and inserting:

That three managers and three counsel for the respondent may be heard in the concluding argument, in the order in which they state to the Senate they have agreed.

Mr. Edmunds moved to amend the amendment of Mr. Conkling by adding—

and that the argument be limited to six hours on each side.

This amendment was disagreed to, ayes 15, noes 29.

Then, without division, Mr. Conkling's substitute was agreed to, and the original order as amended by the substitute was also agreed to without division.

Then the President pro tempore said:

Will the Senate allow the Chair to state that the Chair understands the witnesses on both sides can be discharged? He makes that announcement so that they can leave.

On July 20 [59] the President pro tempore announced that the arguments would begin, and that the managers would have the opening. Then it was announced that as Mr. Matt. H. Carpenter, of counsel for the respondent, was detained by illness, it had been arranged between the managers and counsel for respondent that Mr. Montgomery Blair, of counsel for the respondent, should open, thereby relieving Mr. Carpenter of the misfortune of not hearing the speech of the manager, to whom he was to reply. At the conclusion of Mr.

[57] Senate Journal, p. 983; Record of trial, p. 285.
[58] Senate Journal, p. 983; Record of trial, pp. 285, 286.
[59] Senate Journal, p. 983; Record of trial, p. 287.

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Blair's address a motion to adjourn was disagreed to. Thereupon Mr. Jeremiah S. Black, of counsel for respondent, said it would be a hardship to have an argument from the managers in the absence of Mr. Carpenter. It was suggested that an argument made this day would be in print in the morning in time for counsel to examine it before replying. Thereupon Mr. Manager William P. Lynde proceeded in argument.

On the next day, July 21,[60] Mr. Manager Lynde having concluded his argument on the preceding day, Mr. Black, of counsel for the respondent, submitted a motion that the Senate sitting for the trial adjourn until the 24th, justifying the motion by the following affidavit:

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me D. W. Bliss, who, being sworn according to law, says that he has been the family physician of Matt. H. Carpenter for seven years when in Washington, that he is now under my care and seriously ill with acute gastritis (inflammation of the stomach); that he has been confined to his bed for the past thirty-six hours, and is not able to leave his room today, and I state my belief that he will be able to resume his duties on Monday the 24th instant.

D. W. BLISS, M. D.

Subscribed and sworn before me this 21st day of July, A.D. 1876.

A. E. BOONE, *Notary Public.*

[SEAL.]

Mr. Black's motion was agreed to, yeas 34, nays 5.

On the assembling of the Senate for the trial, on July 24,[61] Mr. Manager Scott Lord presented an affidavit showing:

United States Senate sitting as a court of impeachment.

THE UNITED STATES *v.* WILLIAM W. BELKNAP.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me, D. W. Bliss, M. D., a practicing physician, who, being sworn according to law, said that Hon. A. G. Lapham has been under his professional care during the past three days and unable to leave his bed by reason of acute cellulitis and perineal abscess, and he will not, in my opinion, be able to resume his official duties before Wednesday, the 20th instant.

D. W. BLISS, M. D.

Sworn and subscribed to before me this 24th day of July, 1876.

A. E. BOONE, *Notary Public.*

Mr. Manager Lord stated that the managers were prepared to go on in Mr. Lapham's absence, but preferred not to, and asked an adjournment to the 26th. The Senate declined to adjourn, whereupon Mr. Manager Lord asked that Mr. Lapham's argument might be printed. And the argument was ordered printed.

Mr. Manager George A. Jenks next proceeded to argument,[62] and was followed [63] by Mr. Jeremiah S. Black, of counsel for respondent.

On July 25 and 26 [64] Mr. Matthew H. Carpenter, of counsel for respondent, submitted argument.

[60] Senate Journal, p. 984; Record of trial, p. 298.
[61] Senate Journal, p. 985; Record of trial, p. 299.
[62] Record of trial, pp. 306–313.
[63] Record of trial, pp. 314–318.
[64] Record of trial, pp. 319–334.

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Following Mr. Carpenter, Mr. Manager Scott Lord, on behalf of the House of Representatives, closed the argument.[65]

2466. Belknap's impeachment continued.

The Senate in secret session adopted an order to govern the voting on the articles in the Belknap amendment.

There was much deliberation over the form of the final question in the Belknap trial.

The voting on the articles in the Belknap impeachment was without debate, but each Senator was permitted to file an opinion.

The Senate in the Belknap trial declined to renounce the practice of deliberating in secret session.

On July 31,[66] as the Senate sitting for the trial was about to determine its method of procedure, Mr. Hannibal Hamlin, a Senator from Maine, proposed such amendment to the rules as would prevent secret sessions; but the Senate, by a vote of 23 yeas to 32 nays, declined to consider it. Then, on motion of Mr. George F. Edmunds, of Vermont, and by a vote of yeas 32, nays 25, the doors were closed for deliberation. Thereupon the following occurred:

Mr. Roscoe Conkling, of New York, submitted the following order for consideration:

Ordered, That when called to vote whether the articles of impeachment or either of them are sustained, any Senator who votes in the negative shall be at liberty to state, if he chooses, that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and the vote shall be entered in the Journal accordingly.

Mr. Edmunds moved to amend by striking out all after the word "ordered" and inserting:

That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, viz: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime or high misdemeanor, as the charge may be, as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty" only. And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John Sherman, of Ohio, moved to amend the amendment of Mr. Edmunds by striking out the word "only" after "guilty," and in lieu thereof inserting:

And each Senator shall be at liberty to state the ground of his vote in a single sentence, which shall be entered on the Journal.

Mr. Aaron A. Sargent, of California, moved to amend the amendment of Mr. Sherman by inserting in lieu of the words proposed to be inserted:

Any Senator who votes in the negative shall be at liberty to state if he chooses that he rests his vote on the absence of guilt proved in fact, or on the want of jurisdiction, as the case may be; and any Senator who votes in the affirmative may add that he holds the vote of a majority heretofore in favor of jurisdiction binding on him, and the vote shall be entered on the Journal accordingly.

Mr. Edmunds moved to amend the order proposed by Mr. Conkling by striking out all after the word "that" and in lieu thereof inserting:

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[65] Record of trial, pp. 334–341.
[66] Senate Journal, pp. 987–991; Record of trial, pp. 341, 342.

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Each Senator may in giving his vote state his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote.

Mr. Conkling moved to amend the amendment of Mr. Edmunds by adding thereto the words:

And immediately following his name and vote.

The amendment of Mr. Conkling to Mr. Edmunds' amendment was agreed to.

On the question to agree to the order of Mr. Edmunds as amended, it was determined in the affirmative.

Mr. Edmunds then withdrew the amendment first offered by him to the order proposed by Mr. Conkling.

The question then being on the order of Mr. Conkling as amended, as follows:

Ordered, That each Senator may, in giving his vote, give his reasons therefor, occupying not more than one minute, which reasons shall be entered in the Journal in connection with his vote and immediately following his name and vote,

It was determined in the affirmative.

Mr. Edmunds submitted the following order for consideration:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote without debate on the several articles of impeachment. The presiding officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator ———, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime," or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty," with his reasons, if any, as provided in the order already adopted; and each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

Mr. John J. Ingalls, of Kansas, moved to amend the order by striking out all after the word "impeachment," in line 4, and in lieu thereof inserting:

And that in taking the final question the presiding officer shall call each Senator by name in alphabetical order and upon each article propose as follows:

"Mr. Senator ———, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may, as provided in the order already adopted, state the ground of his vote.

The question being taken on this amendment by yeas and nays, resulted—yeas 24, nays 27.

So the amendment of Mr. Ingalls was rejected.

The question recurring on the order of Mr. Edmunds, Mr. William B. Allison, of Iowa, demanded a division of the question; and the question being put on the first branch of the order, namely:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment,

It was agreed to.

The question being on the second clause of the order of Mr. Edmunds, Mr. Ingalls moved to amend the clause by inserting in lieu thereof the following:

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And that in taking the final question the presiding officer of the Senate shall call each Senator by name in alphabetical order, and upon each article propose as follows, that is to say: "Mr. Senator ———, how say you, is the impeachment under this article sustained?"

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case.

Mr. Edmunds demanded a division of Mr. Ingalls's amendment; and the question being put on the first branch thereof, it was disagreed to—yeas 24, nays 26.

The question being put in the second branch of the amendment of Mr. Ingalls—namely, strike out all of the order of Mr. Edmunds after "impeachment" and in lieu thereof insert—

Whereupon each Senator shall rise in his place and answer "yea" or "nay," and may also, as provided in the order already adopted, state the grounds of his vote; and each Senator may, within two days thereafter, file his opinion in writing, to be published in the printed proceedings of the case,

It was disagreed to.

The question recurring on the order of Mr. Edmunds, it was agreed to, as follows:

Ordered, That on Tuesday next, the 1st day of August, at 12 o'clock meridian, the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles successively, and after the reading of each article the presiding officer shall put the question following, namely: "Mr. Senator——, how say you? Is the respondent, William W. Belknap, guilty or not guilty of a high crime" or "high misdemeanor," as the charge may be, "as charged in this article?" Whereupon such Senator shall rise in his place and answer "guilty" or "not guilty" with his reasons, if any, as provided in the order already adopted.

And each Senator shall be permitted to file within two days after the vote shall have been so taken his written opinion, to be printed with the proceedings.

The Senate, sitting for the trial, thereupon adjourned.

2467. The Belknap's impeachment continued.

The managers alone attended in the Senate on the day the Senate rendered judgment in the Belknap case.

The respondent in the Belknap trial attended throughout until the time of rendering judgment.

The President pro tempore announced the result of the vote on each article and the acquittal of respondent on each.

The vote on the final question in the Belknap trial was affected conclusively by opinions as to the question of jurisdiction.

Having announced the result of the voting in the Belknap case, the President pro tempore directed the entry of a judgment of acquittal.

The adjournment without day of the Senate sitting for the Belknap trial was pronounced after vote of the Senate.

On August 1 [67] the Senate, sitting for the trial, began its proceedings with the usual formalities. The usual message [68] was sent to the House of Representatives; but as usual the managers alone appeared, the House adhering to its resolution made early in the trial. Mr. Matt. H. Carpenter, of counsel for the respondent, appeared. The respondent

[67] Senate Journal, pp. 992–1012; Record of trial, pp. 342–357.
[68] House Journal, p. 1361.

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himself, who had attended with his counsel throughout the trial, was not present either on this or the preceding day.

After the Journal had been read the President pro tempore announced that according to the order already adopted the Senate would now proceed to vote on the several articles. The voting then began, the Secretary reading each article, and each Senator rising in his place and pronouncing his decision, either with or without the permitted explanation.

The result of the voting was as follows:

	Guilty	Not guilty
Article I	35	25
Article II	36	25
Article III	36	25
Article IV	36	25
Article V	37	25

After the vote on each article the President pro tempore made announcement in form as follows:

On this article 37 Senators vote "guilty" and 25 Senators vote "not guilty." Two-thirds of the Senators present not sustaining the fifth article, the respondent is acquitted on this article.

An analysis of the reasons given with the votes shows that of those voting "guilty," 2 believed that the Senate had no jurisdiction, but gave their verdict in good faith, since by vote jurisdiction had been assumed. Of those voting "not guilty" 3 announced that they did so on the evidence, while 22 announced that they voted not guilty because they believed the Senate had no jurisdiction. One Senator stated that he declined to vote because he believed they did not have jurisdiction. He did not ask to be excused from voting.

At the conclusion of the voting the President pro tempore announced:

This concludes the action of the Senate on all the articles of the impeachment. The Chair will call the Senate's attention to Rule 22, which provides:

"And if the impeachment shall not upon any of the articles presented be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered."

If there be no objection to complying therewith, the Secretary will be directed to enter a judgment of acquittal. Is there objection? The Chair hears none, and it will be so entered.

The Senate, sitting for the impeachment, then voted, on motion of Mr. George F. Edmunds, a Senator from Vermont, to adjourn without day, and the President pro tempore said:

The Senate sitting for the trial of the impeachment of William W. Belknap, late Secretary of War, stands adjourned without day.

2468. Belknap's impeachment continued.

At the conclusion of the Belknap trial the managers presented to the House a written report of the judgment and certain features of the trial.

On August 2,[69] in the House of Representatives, Mr. Manager Scott Lord presented the following report in writing, which was read to the House and ordered printed:

[69] House Journal, p. 1373, Record, pp. 5082, 5083.

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That the defendant, William W. Belknap, has been acquitted on all the articles presented against him, less than two-thirds of the Senators present voting "guilty." The final vote was 61; 37 of the Senators voted "guilty," 23 "not guilty for want of jurisdiction," 1 "not guilty,"[70] and I criticized a portion of the articles of impeachment, and stated that the offenses charged in other of the articles were not proved beyond a reasonable doubt. A change of 5 votes would have resulted in the conviction of the defendant by the two-thirds vote required by the Constitution.

The question of jurisdiction, raised by the plea of the defendant, was the point presented to the court of impeachment. After a protracted and exhaustive argument, the court held that it had jurisdiction, notwithstanding the resignation of the defendant; and the managers proceeded to prove the offenses charged in the articles of impeachment, and after proving them so conclusively that only two[71] Senators in any manner questioned the guilt of the defendant, the minority of the Senate referred to be governed by the deliberate judgment of the mapority, that it had jurisdiction, and, in the form and mode before referred to, prevented the conviction of the defendant.

While exercising the power to vote "not guilty," it was practically asserted that there was no converse to the proposition, and therefore the Senators had no legal right to vote "guilty," however satisfied of the guilt of the accused.

Notwithstanding this result, the managers believe that great good will accrue from the impeachment and trial of the defendant. It has been settled thereby that persons who have held civil office in the United States are impeachable, and that the Senate has jurisdiction to try them, although years may elapse before the discovery of the offense or offenses subjecting them to impeachment. To such as are or may hereafter be among the civil officers of the United States, who have no higher plane of integrity than the rule that "honesty is the best policy," and it is conceded they are comparatively few, this decision will be a constant warning that impeachable offenses, though not discovered for years, may result in impeachment, conviction, and public disgrace. To settle this principle, so vitally important in securing the rectitude of the class of officers referred to, is worth infinitely more than all the time, labor, and expense of the protracted trial closed by the verdict of yesterday.

This report was evidently unanimous, and at the conclusion of the reading Messrs. Managers George F. Hoar and Elbridge G. Lapham addressed the House briefly affirming strongly the positions taken by the report.

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[70] Three voted "not guilty"—Messrs. Conover, Patterson, and Wright. (See pp. 355–357 of Record of trial.) The number voting "not guilty for want of jurisdiction" was 22, and 1, Jones, of Florida, declined to vote because he considered the Senate had no jurisdiction.

[71] Three Senators voted not guilty.

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The Impeachment and Trial of Charles Swayne [1]

1. Charges by a State legislature. Section 2469.
2. Investigation by House committee. Sections 2470, 2471.
3. Impeachment at the bar of the Senate and preparation of articles. Sections 2472–2474.
4. Appointment of managers and exhibition of articles. Sections 2475, 2476.
5. Organization of Senate for trial. Section 2477.
6. Process issued. Section 2478.
7. Return on summons and appearance of respondent. Section 2479.
8. Respondent's answer. Sections 2480, 2481.
9. Replication of the House. Section 2482.
10. Presentation of testimony. Section 2483.
11. Final arguments. Section 2484.
12. Decision of the Senate. Section 2485.

2469. The impeachment and trial of Charles Swayne, judge of the northern district of Florida.

A Member, rising in his place, impeached Judge Swayne both on his own responsibility and on the strength of a legislative memorial.

Discussion as to the degree of definiteness of charges required to justify the House in ordering an investigation.

The House declined to have the impeachment of Judge Swayne considered by a committee before ordering an investigation.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Swayne.

On December 10, 1903,[2] Mr. William B Lamar, of Florida, claiming the floor for a question of privilege, said:

Mr. Speaker, I believe that the impeachment of a civil officer by this House is a question of privilege. I have made a joint resolution adopted by the legislature of the State of Florida a part of the resolution which I desire to submit to this House for its adoption. In pursuance of this joint resolution of the legislature of the State which I have the honor in part to represent, I impeach Charles Swayne, judge of the northern district of the State of Florida, of high crimes and misdemeanors; and the resolution which I have prepared in accordance with former proceedings of this House in like cases:

"Whereas the following joint resolution was adopted by the legislature of the State of Florida:

"Senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida.

"*Be it resolved by the legislature of the State of Florida:*

"Whereas Charles Swayne, United States district judge of the northern district of Florida, has so conducted himself and his court as to cause the people of the State to doubt his integrity and to believe that his official actions as judge are susceptible to corrupt influences and have been so corruptly influenced;

[1] Hinds' Precedents, vol. 3, p. 948 (1907).
[2] Second session Fifty-eighth Congress, Journal, p. 37; Record, pp. 95, 103.

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"Whereas it also appears that the said Charles Swayne is guilty of a violation of section 551 of the Revised Statutes of the United States in that he does not reside in the district for which he was appointed and of which he is judge, but resides out of the State of Florida and in the State of Delaware or State of Pennsylvania, in open and defiant violation of said statute, and has not resided in the northern district of Florida, for which he was appointed, in ten years, and is constantly absent from said district, only making temporary visits for a pretense of discharging his official duties;

"Whereas the reputation of Charles Swayne as a corrupt judge is very injurious to the interests of the entire State of Florida, and his constant absence from his supposed district causes great sacrifice of their rights and annoyance and expense to litigants in his court;

"Whereas it also appears that the said Charles Swayne is not only a corrupt judge, but that he is ignorant and incompetent, and that his judicial opinions do not command the respect or confidence of the people;

"Whereas the administration of the United States bankruptcy act in the court of said Charles Swayne and by his appointed referee has resulted in every instance in the waste of the assets of the alleged bankrupt by being absorbed in unnecessary costs, expenses, and allowances, to the great wrong and injury of creditors and others, until such administration is, in effect, legalized robbery and a stench in the nostrils of all good people:

"*Be it resolved by the house of representatives of the State of Florida (the senate concurring)*, That our Senators and Representatives in the United States Congress be, and they are hereby, requested to cause to be instituted in the Congress of the United States proper proceedings for the investigation of the proceedings of the United States circuit and districts court for the northern district of Florida by Charles Swayne as United States judge for the northern district of Florida, and of his acts and doings as such judge, to the end that he may be impeached and removed from such office.

"*Be it resolved further*. That the secretary of state of the State of Florida be, and is hereby, instructed to certify to each Senator and Representative in the Congress of the United States, under the great seal of the State of Florida, a copy of this resolution and its unanimous adoption by the legislature of the State of Florida.

"STATE OF FLORIDA, OFFICE OF THE SECRETARY OF STATE.

"UNITED STATES OF AMERICA, *State of Florida, ss:*

"I, H. Clay Crawford, secretary of state of the State of Florida, hereby certify that the foregoing is a true and exact copy of senate joint resolution in reference to Charles Swayne, judge of the United States court for the northern district of Florida, passed by the legislature of Florida, session of 1903, and on file in this office.

"Given under my hand and the great seal of the State of Florida at Tallahassee, the capital, this the 7th day of September, A. D. 1903.

[L. S.] "'H. CLAY CRAWFORD, *Secretary of State.*

"*Resolved*, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Charles Swayne, judge of the United States district court for the northern district of Florida and say whether said judge has held terms of his court as required by law; whether he has continuously and persistently absented himself from the said State, and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that district of the benefits of the court therein to amount to a denial of justice; whether the said judge has been guilty of corrupt conduct in office, and whether his administration of his office has resulted in injury and wrong to litigants of his court.

"And in reference to this investigation the said committee is hereby authorized and empowered to send for persons and papers, administer oaths, take testimony, and to employ a clerk and stenographer, if necessary, to send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. And the said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant-at-arms, by himself or deputy, who shall serve the processes of said committee and subcommittee and execute its orders, and shall attend the sittings of the same as ordered and directed thereby. And that the expense of such investigation shall be paid out of the contingent fund of the House."

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Mr. Charles H. Grosvenor, of Ohio, raised the question that the specifications made by the Member from Florida were not sufficiently specific; and after debate Mr. Lamar said:

I charge this judge, first, with continued, persistent, and, if you please, pernicious absenteeism from his district; second, with corrupt official conduct, based upon several matters. * * * Third, I charge Judge Swayne with maladministration of judicial matters in his court, so much so as to embarrass bankrupts and annihilate the assets of litigants and others appearing within his jurisdiction.

Renewed objection being made that charges should be more definite and better substantiated in order to initiate proceedings so important, Mr. John F. Lacey, of Iowa, moved that the resolution be referred to the Committee on the Judiciary.

After debate the motion of Mr. Lacey was disagreed to, ayes 53, noes 129.

The resolution was then agreed to without division.

2470. The Swayne impeachment continued.

The resolution impeaching Judge Swayne was reported from a divided committee.

The committee investigating Judge Swayne took testimony in the Judge's district as well as in Washington.

In the investigation of the conduct of Judge Swayne the accused was present in person with counsel and argued his own case.

In investigating the conduct of Judge Swayne both complainants and accused were permitted to introduce sworn testimony.

On March 25, 1904, Mr. Henry W. Palmer, of Pennsylvania, from the Committee on the Judiciary, presented the report [3] of that committee. The report says:

Testimony was taken in Pensacola, Tallahassee, and Jacksonville, Fla., and in the city of Washington upon several days. At all the hearings the Hon. Charles Swayne was present himself and by counsel, except at the last hearings in Washington, when he appeared in propria persona and argued his case before the subcommittee. All the witnesses asked for by the complainants and the respondent were sworn. Their evidence was reduced to writing and is presented with this report.

Specifications of the particular matters covered by the general charges were furnished the committee by the complainants. They were as follows:

Specification 1.—That the said Charles Swayne, judge of the United States court in and for the northern district of Florida, for ten years, while he has been such judge, was a nonresident of the State of Florida, and resided in the State of Delaware. That he never pretended to reside in Florida until May, 1903. That during said time of his nonresidence, by such nonresidence, he has caused great inconvenience, annoyance, injury, and expense to litigants in his court, not so much by failure to hold terms of court as by failing to be in reach for the disposition of admiralty and chancery matters and other matters arising between terms of court needing disposition.

Specification 2.—That said Charles Swayne, as such judge, appointed one B. C. Tunison as United States commissioner; that it was charged that it was an improper appointment, and that testimony was offered to such effect before said appointment.

Specification 3.—That the said Charles Swayne, as such judge, appointed and maintains one John Thomas Porter as United States commissioner at Marianna, but that said Porter does not reside at Marianna, but at Grand Ridge, 16 miles away, and is never at Marianna or at his office except when notified of an arrest, necessitating people having business with the United States commissioner, often at expense and inconvenience, to go to Grand Ridge, and necessitating the holding of prisoners often for a day or two, at their inconvenience, and in imprisonment at the expense of the Government, until said Porter sees fit to come to Marianna.

[3] House Report No. 1905.

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The said Swayne, although there is great necessity for a commissioner at Marianna, has refused to appoint such.

Specification 4.—That said Swayne, in the administration of his court, has been guilty of great partiality and favoritism to one B. C. Tunison, mentioned in specification No. 2, and a practicing attorney in said court. That so great and well known has this partiality and favoritism become that it has created the general impression that to succeed in that court before the said Swayne it is necessary to retain the said Tunison.

Specification 5.—That said Swayne has been guilty of oppression and tyranny in his office, incorrectly and oppressively and without just cause imprisoning one W. C. O'Neal, one E. T. Davis, and one Simeon Belding upon feigned, fictitious, and false charges of contempt of his said court.

Specification 6.—That said Charles Swayne has willfully, negligently, and corruptly maladministered bankruptcy cases in his court, to the extent that the assets of bankrupts have, in all or nearly all cases, been squandered and dissipated in paying extraordinary fees and expenses, and never paying any dividends to creditors.

Specification 7.—That said Charles Swayne was guilty of oppression and tyranny in his office to one Charles Hoskins, upon an alleged contempt resulting in the suicide of the said Hoskins, and said alleged contempt proceedings being brought for the purpose of breaking down and injuring one W. R. Hoskins, who was charged in said court with involuntary bankruptcy, but who was defending and resisting such charge.

Specification 8.—That said Swayne corruptly purchased a house and lot in the city of Pensacola while the said house and lot was in litigation in his court.

Specification 9.—Ignorance and incompetency to hold said position. Under this specification many illustrations could be given, among them a case in which he took jurisdiction in admiralty in violation of the treaty between the United States and Sweden and Norway; and in one case, that of Sweet *v.* Owl Commercial Company, in which he charged the jury to exactly and diametrically conflicting theories of law.

Specification 11.—That said Swayne, by reason of his absence from the State, failed to hold the term of court which should have been held at Tallahassee in the fall of the year 1902, during the months of November and December.

Specification 12.—That the said Charles Swayne has been guilty of conduct unbecoming an upright judge, in that he has procured as indorsers on his note, for the purpose of borrowing money, attorneys and litigants having cases pending in his court.

Specification 13.—That the said Charles Swayne has been guilty of maladministration in the affairs of the conduct of his office; that he has discharged people convicted of crime in his court. Illustration, case of Alonzo Love, convicted in the year of 1902, of perjury.

The committee found that the evidence sustained the first, fourth, fifth, and seventh specifications, and concluded:

The charges and specifications not covered by the foregoing findings were not proved by sufficient evidence to warrant action upon them.

Upon the whole case it is plain that Judge Swayne has forfeited the respect and confidence of the bar of his court and of the people of his district who do business there. He has so conducted himself as to earn the reputation of being susceptible to the malign influence of a man of notoriously bad character. He has shown himself to be harsh, tyrannical, and oppressive, unmindful of the common rule of a just and upright judge. He has continuously and persistently violated the plain words of a statute of the United States, and subjected himself to punishment for the commission of a high misdemeanor. He has fined and imprisoned members of his bar for a constructive contempt without the authority of law and without a decent show of reason, either through inexcusable ignorance, a malicious intent to injure, or a wanton disposition to exercise arbitrary power. He has condemned to a term of imprisonment in the county jail a reputable citizen of the State of Florida over whom he had no jurisdiction, who was guilty of no thought of a contempt of his court, for no offense against him or in the presence of the court, or "in obstruction of any order, rule, command, or decree," and after the accused had purged himself on oath.

For all those reasons Charles Swayne has been guilty of misbehavior in his office of judge and grossly violated the condition upon which he holds this honorable appointment. The honor of the judiciary, the orderly and decent adminis-

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tration of public justice, and the welfare of the people of the United States demand his impeachment and removal from the high place which his conduct has degraded.

It is vitally necessary to maintain the confidence of the people in the judiciary. A weak executive or an inefficient or even dishonest legislative branch may exist, for a time at least, without serious injury to the perpetuity of our free institutions, but if the people lose faith in the judicial branch, if they become convinced that justice can not be had at the hands of the judges, the next step will be to take the administration of the law into their own hands and do justice according to the rule of the mob, which is anarchy, with which freedom can not coexist.

The Committee on the Judiciary recommend the adoption of the following resolution:

"*Resolved*, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor."

A minority of the committee composed of Messrs. J. N. Gillett, of California, Robert M. Nevin, of Ohio, D. S. Alexander, of New York, George A. Pearre, of Maryland, Charles E. Littlefield, of Maine, and Richard W. Parker, of New Jersey, joined in minority views dissenting from the conclusions of the committee, and holding that the evidence did not justify impeachment.

2471. The Swayne impeachment continued.

The impeachment of Judge Swayne was postponed to the next session of Congress for further investigation.

In the second investigation Judge Swayne testified on his own behalf and was cross-examined.

The rule as to the pertinency of evidence to the charges was enforced in the investigation of Judge Swayne's conduct.

The closing arguments in the Swayne investigation were heard before the subcommittee which had taken the evidence.

On April 7, 1904,[4] Mr. Palmer offered as a question of privilege the following, which was agreed to without division:

Resolved, That the consideration of the resolution (No. 274) reported by the Committee on the Judiciary in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in the northern district of Florida, be postponed until the 13th day of December, 1904, and that the Committee on the Judiciary be, and it is hereby, authorized to take such further testimony as may be offered by the complainants or the respondent, and report the same to the House, with its conclusions thereon. The said committee and subcommittee shall have all the authority conferred by the original resolution (No. 86), and the further authority to take testimony when Congress is not in session.

In accordance with this resolution a subcommittee composed of Messrs. Palmer, Clayton, and Gillett took testimony at various times from February 13 to November 29, 1904.[5] In the course of these proceedings[6] Judge Swayne, besides having counsel, also appeared for himself, offered evidence, and cross-examined witnesses; and Hon. B. S. Liddon appeared for the complainants. In the course of the testimony Judge Swayne made "a statement to the stenographer," which is published with the evidence, and later it appears that "Charles Swayne, having been recalled, testified as follows."[7] After he had concluded his direct statement he was cross-examined by Mr. Liddon at length.[8]

[4] Record, p. 4431.
[5] See published evidence, "Washington: Government Printing Office, 1904."
[6] See page 211 of testimony.
[7] Pages 240, 578.
[8] Page 591.

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As to the character of the testimony permitted in the examination before the subcommittee, the chairman, Mr. Palmer, stated[9] that no testimony would be received on irrelevant questions or on charges which, if proven, would not be considered grounds of impeachment. Hearsay testimony was, on objection, ruled out.[10] On the question of relevancy one notable ruling was made.[11] Judge Swayne was charged with having certified as expenses sums greater than he had actually expended. His counsel attempted to introduce documents to show that other Federal judges did likewise. This evidence was excluded by the subcommittee on the ground that it was not relevant to Judge Swayne's case. In the course of the proceedings a question arose as to whether the briefs or arguments should be heard before the subcommittee or before the whole Judiciary Committee.[12] In fact, they were heard before the subcommittee.

On December 9, 1904,[13] Mr. Palmer reported from the Judiciary Committee the testimony, with the following resolution, adopted by a majority of the committee:

> *Resolved*, That the Committee on the Judiciary respectfully report to the House the testimony taken in the case of Charles Swayne since Congress adjourned, with the conclusion that in their opinion said testimony strengthens the case against the said Charles Swayne.

The minority views, submitted by Mr. Richard Wayne Parker, of New Jersey, and concurred in by Messrs. John J. Jenkins, of Wisconsin; D. S. Alexander, of New York; Vespasian Warner, of Illinois; Charles E. Littlefield, of Maine; Lot Thomas, of Iowa; J. N. Gillett, of California, and George A. Pearre, of Maryland, contended that the additional evidence weakened rather than strengthened the case, except as to the charge as to false certificates of expenses of travel. On this point the minority say:

> Evidence as to the alleged practice of other judges in this respect was offered and excluded, and we think properly. It would have been competent for him, when a witness in his own behalf, to have stated why he made those certificates. As a witness he answered and explained every other charge. This charge he made no effort as a witness to answer or explain. The inference from the record, on general principles, is that the charge is admitted to be true and that he has no answer or explanation thereto. Whether a satisfactory explanation can be made we do not say. We must take the record as it stands.
>
> Upon this record, unanswered and unexplained, we are of the opinion that in this particular an impeachable offense has been made out.

2472. The Swayne impeachment continued.

Form of resolutions impeaching Judge Swayne directing that the impeachment be carried to the bar of the Senate.

The House decided that the articles impeaching Judge Swayne should be prepared by a select committee.

Constitution of the committee to carry the Swayne impeachment to the Senate.

The Speaker, in the committee to draw the articles in the Swayne case, gave minority representation to those opposed generally to the impeachment.

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[9] Page 7 of testimony; also p. 240.
[10] Pages 8, 46.
[11] Pages 433–435.
[12] Pages 242, 243.
[13] House Report No. 3021, third session Fifty-eighth Congress.

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On December 13, 1904,[14] the reports were considered in the House, the pending resolution being:

Resolved, That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high misdemeanor.

At the conclusion of the debate, on motion of Mr. Palmer, the House agreed to the following amendment:

Amend by striking out all after the word "*Resolved*" and inserting "That Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, be impeached of high crimes and misdemeanors."

The previous question was then ordered on the amendment and original resolution by a vote of ayes 198, noes 61. The amendment was then agreed to, and then the resolution as amended was agreed to without division.

Then, on motion of Mr. Palmer, it was—

Resolved, That a committee of five be appointed to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

Mr. Palmer then offered[15] the following:

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, with power to send for persons, papers, and records.

Mr. Palmer explained that this resolution was in accordance with all the precedents except that of the Belknap case, wherein the Judiciary Committee had framed the articles.

Mr. Charles E. Littlefield, of Maine, proposed this amendment:

Strike out "a committee of seven is appointed" and insert "the Committee on the Judiciary be empowered."

The question being taken, the amendment was disagreed to, ayes 113, noes 140. Then the original resolution was agreed to without division.

On the same day[16] the Speaker[17] appointed the following committee to carry the impeachment to the bar of the Senate: Messrs. Henry W. Palmer, of Pennsylvania; John J. Jenkins, of Wisconsin; J. N. Gillett, of California; Henry D. Clayton, of Alabama, and David H. Smith, of Kentucky. All of these were members of the Committee on the Judiciary, two of them belonged to the minority party in the House, and two had signed the minority views which accompanied the report from the Judiciary Committee.

On December 14[18] the Speaker announced the appointment of the following committee to prepare articles of impeachment: Messrs. Henry W. Palmer, of Pennsylvania; J. N. Gillett, of California; Richard Wayne Parker, of New Jersey; Charles E. Littlefield, of

[14] Third session Fifty-eighth Congress; Record, pp. 214–249.
[15] House Journal, p. 51; Record, p. 248.
[16] House Journal, p. 51; Record, p. 249.
[17] Joseph G. Cannon, of Illinois, Speaker.
[18] House Journal, p. 55; Record, p. 277.

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Maine; Samuel L. Powers, of Massachusetts; Henry D. Clayton, of Alabama, and David A. De Armond, of Missouri. Three of these gentlemen had signed the minority views on the question of impeachment. The minority party in the House was also represented by three members of the committee.

2473. The Swayne impeachment continued.

Forms and ceremonies of presenting the Swayne impeachment in the Senate.

On December 14,[19] in the Senate, a message from the House of Representatives by Mr. W. J. Browning, its Chief Clerk, was delivered, as follows:

Mr. President, I am directed by the House of Representatives to communicate to the Senate the following resolution:

"*Resolved*, That a committee of five be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles Swayne, judge of the district court of the United States, for the northern district of Florida, of high crimes and misdemeanors in office, and to acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Charles Swayne to answer said impeachment.

"The Speaker announced the appointment of Mr. Palmer of Pennsylvania, Mr. Jenkins of Wisconsin, Mr. Gillett of California, Mr. Clayton of Alabama, and Mr. Smith of Kentucky, members of said committee."

The Assistant Sergeant-at-Arms (B. W. Layton) announced the presence of the committee from the House of Representatives.

The President pro tempore [20] said:

The Senate will receive the committee from the House of Representatives.

The committee from the House of Representatives was escorted by the Sergeant-at-Arms (D. M. Ransdell) to the area in front of the Vice-President's desk, and its chairman, Mr. Palmer, said:

Mr. President, in obedience to the order of the House of Representatives we appear before you, and in the name of the House of Representatives and of all of the people of the United States of America we do impeach Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office; and we do further inform the Senate that the House of Representatives will in due time exhibit articles of impeachment against him and make good the same. And in their name we demand that the Senate shall take order for the appearance of the said Charles Swayne to answer the said impeachment.

The President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take proper order in the premises, notice of which will be given to the House.

The committee of the House of Representatives thereupon retired from the Chamber.

On the same day, in the Senate,[21] Mr. Orville H. Platt, of Connecticut, presented the following resolution, which was agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Charles Swayne be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

The President pro tempore thereupon appointed Messrs. Platt, of Connecticut; Clarence D. Clark, of Wyoming; Charles W. Fairbanks,

[19] Senate Journal, p. 38; Record, p. 257.
[20] William P. Frye, of Maine, President pro tempore.
[21] Senate Journal, p. 39; Record, p. 265.

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of Indiana; Augustus A. Bacon, of Georgia, and Edmund W. Pettus, of Alabama.

In the House of Representatives, on the same day,[22] the committee appointed to go to the Senate and at the bar thereof and, in the name of the House of Representatives and of all the people of the United States, to impeach Judge Charles Swayne, appeared at the bar of the House.

Mr. Palmer being recognized, reported verbally:

Mr. Speaker, in obedience to the order of the House, we proceeded to the bar of the Senate, and, in the name of this body and of all the people of the United States, we impeached, as we were directed to do, Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and we demanded that the Senate should take orders to make him appear before that body to answer for the same; and announced that the House would soon present articles of impeachment and make them good, to which the response was: "Order shall be taken."

On December 15,[23] in the Senate, Mr. Platt, from the select committee, reported the following, which was agreed to by the Senate:

Whereas the House of Representatives, on the 14th day of December, 1904, by five of its Members (Mr. Palmer, of Pennsylvania; Mr. Jenkins, of Wisconsin; Mr. Gillett, of California; Mr. Clayton, of Alabama, and Mr. Smith, of Kentucky), at the bar of the Senate impeached Charles Swayne, judge of the district court of the United States for the northern district of Florida, of high crimes and misdemeanors in office, and informed the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and likewise demanded that the Senate take order for the appearance of the said Charles Swayne to answer the said impeachment: Therefore,

Ordered, That the Senate will, according to its standing rule and orders in such cases provided, take proper order thereon (upon the presentation of the articles of impeachment), of which due notice shall be given to the House of Representatives.

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

On the same day,[24] in the House, the message was received, and having been read, was ordered to lie on the table.

2474. The Swayne impeachment continued.

The articles impeaching Judge Swayne were reported from a divided committee and agreed to by a divided House.

On January 10, 1905,[25] Mr. Palmer, from the select committee appointed to prepare articles of impeachment, presented the report of the majority of that committee as follows:

The select committee appointed to prepare and report articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida, appointed December 13, 1904, submit the following report:

That the evidence heretofore taken in the matter of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, sustain twelve articles of impeachment, which are submitted herewith, with the recommendation that they be adopted by the House and exhibited to the Senate. [Here followed the articles.]

Messrs. Littlefield, Parker, and Gillett filed minority views. Messrs. Littlefield and Parker in their views said:

The House must establish the truth of these articles, by competent testimony, beyond reasonable doubt.

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[22] House Journal, p. 56; Record, p. 281.
[23] Senate Journal, p. 60; Record, pp. 295, 296.
[24] House Journal, p. 69; Record, p. 321.
[25] House Journal, p. 115; Record, pp. 665–667; House Report, No. 3477.

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The only articles which, in our judgment, the record as it now stands would sustain are based upon the certificates of expenses. As to these it was claimed in the hearings that other judges have construed the law as it was construed by Judge Swayne, and evidence was offered to establish that claim and excluded.

We dissent from all the other articles, and especially as to those based upon the contempt proceedings in the Davis, Belden, and O'Neal cases. These cases clearly involved willful and marked contempt of court and demanded exemplary and summary punishment from any self-respecting court.

The charge as to nonresidence is not supported by such evidence as warrants the adoption of articles in that regard.

The use of the private car, which is the proper subject of adverse criticism, taking into account the fact that there is no intimation or claim that any judicial act was influenced, or attempted to be influenced thereby, is not of such gravity as to justify impeachment proceedings therefor.

The car incident occurred more than ten years ago, and no residence question has existed for more than four years. No statute of limitation can apply, but the great proceeding of impeachment is not to be used as to stale charges not affecting the moral character or the present fitness of the officer to perform his duty.

Mrs. Gillett concurred in these views except as to the certificates of expenses, saying:

I concur in all that is said in the foregoing "Views of the minority" except as to the certificates for expenses. At the hearing before the committee Judge Swayne offered to prove the custom and practice of the Federal judges in making certificates for their reasonable expenses for travel and attendance when holding court out of their district, the purpose being to show a judicial construction of the statute under which these expenses were allowed. This offer was denied by the committee and all inquiry upon this subject shut off.

Therefore, for this reason, the record is silent upon matters which, in my judgment, should have been submitted to the consideration of this House. The record is silent as to the custom and practice of other judges in this particular as to the construction which they placed upon the statute, and as to the construction which the disbursing and auditing officers of the Government gave it.

The intent with which Judge Swayne made these certificates is of controlling importance, and all of the facts and circumstances surrounding the matter, the practice and customs of other judges, and the construction placed upon the statute by them and by the Government, if any, are and were proper subjects of inquiry. While the record is silent on these questions, for the reason above stated, still it appears from official records, some of which have been furnished to me by the Treasury Department, that a majority of the district and circuit judges in five circuits, selected at random, make out certificates for $10 a day, and in two of these districts every judge made out such certificates.

I am inclined to believe that where a practice has been so general these judges acted in good faith with an honest belief that a fair construction of the statute gave them $10 a day for an allowance for travel and attendance while attending court out of their district, and I also feel that this House would with great reluctance pass a resolution impeaching them all; and if not all, why one?

On this article my mind is not satisfied beyond a reasonable doubt that Judge Swayne, in following a practice so well established by so many honorable men, committed a criminal offense for which he should either be prosecuted or impeached, and giving him the benefit of this doubt I can not consent to any impeachment on that ground.

On January 12, 13, 16, 17, and 18,[26] the articles were debated at length, and on the latter day the question was taken first on a motion of Mr. Charles E. Littlefield, of Maine, to lay the first three articles on the table. This motion was disagreed to,[27] yeas 159, nays 167.

Then the question was taken on agreeing to the first three articles (relating to the false certificates), and they were agreed to—yeas 165, nays 160.

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[26] Record, pp. 754–764, 806–822, 925–950, 972–993, 1021–1058.
[27] House Journal, pp. 158–163; Record, pp. 1053–1058.

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The question was next taken on the fourth and fifth articles, a division of the question being demanded so as to vote on those two articles separated from the remaining articles.

Then, by unanimous consent, it was permitted that the House, by a single vote, should pass on two similar amendments which Mr. Marlin E. Olmsted, of Pennsylvania, proposed, the one to article 4 and the other to article 5. Mr. Olmsted explained the amendments as follows:

The change which I propose is perhaps not very material; but it may be. He is charged in article 4 and again in article 5, as they now stand, with having appropriated to his own use, under a claim of right, the car of a certain railroad company and the provisions therein under the claim that, being in the hands of a receiver, he had a right to use them. Now, the facts are, according to the testimony of Judge Swayne himself and of Mr. Axtell, attorney for the receiver, that Judge Swayne did not appropriate the car, nor demand it, nor claim it as a right. It was the receiver's own suggestion. The receiver tendered Judge Swayne the car and the provisions therein, and Judge Swayne accepted them.

The question being taken, Mr. Olmsted's amendments were disagreed to without division.

Then, by yeas 162, nays 138, articles 4 and 5 were agreed to.

Articles 6 and 7 were then agreed to, yeas 159, nays 136.

Articles 8, 9, 10, and 11, were agreed to, without division.

Also articles 12 and 13 were agreed to without division.

2475. The Swayne impeachment continued.

Forms of resolutions authorizing the appointment of managers of the Swayne impeachment and directing the articles to be exhibited in the Senate.

Constitution of the managers of the Swayne impeachment.

Then, on motion of Mr. Palmer, the following resolutions were severally agreed to.[28]

Resolved, That seven managers be appointed by the Speaker of this House to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

Resolved, That the articles agreed to by this House to be exhibited in the name of themselves and of all the people of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, in maintenance of their impeachment against him of high crimes and misdemeanors in office be carried to the Senate by the managers appointed to conduct said impeachment.

On January 21,[29] the Speaker announced the appointment of the following managers:

Messrs. Henry W. Palmer, of Pennsylvania; Samuel L. Powers, of Massachusetts; Marlin E. Olmsted, of Pennsylvania; James B. Perkins, of New York; Henry D. Clayton, of Alabama; David A. De Armond, of Missouri, and David H. Smith, of Kentucky.

Four of the managers belonged to the majority party in the House and three to the minority. All but two were members of the Judiciary Committee. The entire number were favorable to the impeachment, and all had voted for all the articles of impeachment so far as appeared by record votes, except Mr. Powers, who was absent, and Mr. Olmsted, who answered present on the roll call on articles 4 and 5. He voted for the other articles. Mr. Powers was of the committee which framed the articles, and joined in the report favorable to them.

[28] House Journal, pp. 162, 163; Record, p. 1058.
[29] House Journal, p. 183; Record, p. 1202.

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The managers having been appointed, Mr. Palmer offered this resolution, which was agreed to:

Resolved, That a message be sent to the Senate to inform them that this House has appointed Mr. Palmer, Mr. Powers, of Massachusetts, Mr. Olmsted, Mr. Perkins, Mr. Clayton, Mr. De Armond, and Mr. Smith, of Kentucky, managers to conduct the impeachment against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited for maintenance of their impeachment against said Charles Swayne, and that the Clerk of the House do go with said message.

On the same day [30] the message was transmitted to the Senate and received there. Thereupon, on motion of Mr. Platt, of Connecticut, it was

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Charles Swayne, judge of the district court of the United States for the district of Florida, agreeably to the notice communicated to the Senate.

On January 23,[31] Mr. Palmer, in the House, claiming the floor for a matter of privilege, offered the following resolution, which we agreed to by the House:

Resolved, That the managers on the part of the House in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, be, and they are hereby, authorized to employ a clerk, stenographer, and messenger, and to incur such expense as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House.

2476. The Swayne impeachment continued.

Ceremonies of the exhibition of the articles impeaching Judge Swayne.

The articles of impeachment of Judge Charles Swayne.

Having exhibited in the Senate the articles impeaching Judge Swayne, the managers reported verbally to the House.

On January 24,[32] in the Senate, at 12 o'clock and 30 minutes p.m. the managers of the impeachment, on the part of the House of Representatives, of Judge Charles Swayne appeared below the bar of the Senate, and the Assistant Sergeant-at-Arms (Alonzo H. Stewart) announced their presence as follows:

I have the honor to announce the managers on the part of the House of Representatives to conduct the impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida.

The PRESIDENT pro tempore. The managers on the part of the House will be received, and the Sergeant-at-Arms will assign them their seats.

The managers were thereupon escorted by the Assistant Sergeant-at-Arms of the Senate to the seats assigned to them in the area in front of the Chair.

The PRESIDENT pro tempore. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms (D. M. Ransdell) made proclamation as follows:

Hear ye, hear ye, hear ye. All persons will keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the

[30] Senate Journal, p. 108; Record, p. 1176.
[31] House Journal, p. 186; Record, p. 1246.
[32] Senate Journal, p. 119; Record, pp. 1261–1283.

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United States articles of impeachment against Charles Swayne, judge of the district court of the United States for the northern district of Florida.

Mr. Manager PALMER. Mr. President.

The PRESIDENT pro tempore. Mr. Manager.

Mr. Manager PALMER. The managers on the part of the House of Representatives are ready to exhibit articles of impeachment against Charles Swayne, district judge of the United States in and for the northern district of Florida, as directed by the House, in the words and figures following: [33]

Articles exhibited by the House of Representatives of the United States of America, in the name of themselves and of all the people of the United States of America, against Charles Swayne, a judge of the United States, in and for the northern district of Florida, in maintenance and support of their impeachment against him for high crimes and misdemeanor in office.

ARTICLE 1. That the said Charles Swayne, at Waco, in the State of Texas, on the 20th day of April, 1897, being then and there a United States district judge in and for the northern district of Florida, did then and there, as said judge make and present to R. M. Love, then and there being the United States marshal in and for the northern district of Texas, a false claim against the Government of the United States in the sum of $230, then and there knowing said claim to be false, and for the purpose of obtaining payment of said false claim, did then and there as said judge, make and use a certain false certificate then and there knowing said certificate to be false, said certificate being in the words and figures following:

"UNITED STATES OF AMERICA, *Northern District of Texas, ss:*

"I, Charles Swayne, district judge of the United States for the northern district of Florida, do hereby certify that I was directed to and held court at the city of Waco, in the northern district of Texas, twenty-three days, commencing on the 20th day of April, 1897; also, that the time engaged in holding said court, and in going to and returning from the same, was twenty-three days, and that my reasonable expenses for travel and attendance amounted to the sum of two hundred and thirty dollars and —— cents, which sum is justly due me for such attendance and travel.

"CHAS. SWAYNE, *Judge.*

"WACO, *May 15,1897.*

"Received of R. M. Love, United States marshal for the northern district of Texas, the sum of 230 dollars and no cents in full payment of the above account.

"$230.

"CHAS. SWAYNE."

when in truth and in fact, as the said Charles Swayne then and there well knew, there was then and there justly due the said Swayne from the Government of the United States and from said United States marshal a far less sum, whereby he has been guilty of a high crime and misdemeanor in his said office.

ART. 2. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge, as aforesaid, the said Charles Swayne was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal for the district in which the court was held, and was forbidden by law to receive compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel and attendance were $10 per diem while holding court at Tyler, Tex., twenty-four days commencing December 3, 1900, and seven days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of John Grant, the United States marshal for the eastern district of Texas, the sum of $310, when the reasonable expenses incurred and paid by the said Charles Swayne for travel and attendance did not amount to the sum of $10 per diem.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guilty of a high crime, to wit, the crime of obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

[33] The articles were enrolled on parchment, following the practice of the early trials. In the later trials of Johnson and Belknap the articles had been engrossed on ordinary white paper.

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ART. 3. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge as aforesaid was entitled by law to be paid his reasonable expenses for travel and attendance when lawfully directed to hold court outside of the northern district of Florida, not to exceed $10 per diem, to be paid upon his certificate by the United States marshal of the district in which the court was held, and was forbibdden by law to receive any compensation for such services. Yet the said Charles Swayne, well knowing these provisions, falsely certified that his reasonable expenses for travel in going to and coming from and attendance were $10 per diem while holding court at Tyler, Tex., thirty-five days from January 12, 1903, and six days going to and returning from said Tyler, Tex., and received therefor from the Treasury of the United States, by the hand of A. J. Houston, the United States marshal for the eastern district of Texas, the sum of $410, when the reasonable expenses of the said Charles Swayne incurred and paid by him during said period were much less than said sum.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself and was and is guility of a high crime, to wit, obtaining money from the United States by a false pretense, and of a high misdemeanor in office.

ART. 4. That the said Charles Swayne having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office as judge as aforesaid heretofore, to wit, A.D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car, belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purpose of transporting himself, his family, and friends from Guyencourt, in the State of Delaware, to Jacksonville, Fla., the said railroad company being at the time in the possession of a receiver appointed by said Charles Swayne, judge as aforesaid, on the petition of creditors.

The said car was supplied with provisions by the said receiver, which were consumed by said Swayne and his friends, and was provided with a conductor or porter at the cost and expense of said railroad company, and with transportation over connecting lines. The expenses of the trip were paid by the said receiver out of the funds of the said Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge, allowed the credit claimed by the said receiver for and on account of the said expenditure as a part of the necessary expenses of operating said road. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner, and under a claim of right, for the reason that the same was in the hands of a receiver appointed by him.

Wherefore the said Charles Swayne, judge as aforesaid, was and is guilty, of an abuse of judicial power and of a high misdemeanor in office.

ART. 5. That the said Charles Swayne was duly appointed, commissioned, and confirmed as judge of the United States in and for the northern district of Florida, and entered upon the duties of said office, and while in the exercise of his office of judge as aforesaid heretofore, to wit, A. D. 1893, did unlawfully appropriate to his own use, without making compensation to the owner, a certain railroad car belonging to the Jacksonville, Tampa and Key West Railroad Company for the purpose of transporting himself, his family, and friends from Jacksonville, Fla., to California, said railroad company being at the time in the possession of a receiver appointed by the said Charles Swayne, judge as aforesaid, on the petition of creditors.

The car was supplied with some provisions by the said receiver, which were consumed by the said Swayne and his friends, and it was provided with a porter at the cost and expense of the railroad company and also with transportation over connecting lines. The wages of said porter and the cost of said provisions were paid by the said receiver out of the funds of the Jacksonville, Tampa and Key West Railroad Company, and the said Charles Swayne, acting as judge as aforesaid, allowed the credits claimed by the said receiver for and on account of the said expenditures as a part of the necessary expenses of operating the said railroad. The said Charles Swayne, judge as aforesaid, used the said property without making compensation to the owner under a claim of right, alleging that the same was in the hands of a receiver appointed by him and he therefore had a right to use the same.

Wherefore the said Charles Swayne, judge is aforesaid, was and is guilty of an abuse of judicial power and high misdemeanor in office.

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ART. 6. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A.D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A.D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress approved the 23d of July, A.D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine and contiguous territory were transferred to the southern district of Florida; whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida and to comply with the five hundred and fifty-first section of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless the said Charles Swayne, judge as aforesaid, did not acquire a residence, and did not, within the intent and meaning of said act, reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A.D. 1894, to the 1st day of October, A.D. 1900, a period of about six years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law and was and is guilty of a high misdemeanor in office.

ART. 7. That the said Charles Swayne, having been duly appointed and confirmed, was commissioned district judge of the United States in and for the northern district of Florida on the 1st day of April, A.D. 1890, to serve during good behavior, and thereafter, to wit, on the 22d day of April, A.D. 1890, took the oath of office and assumed the duties of his appointment, and established his residence at the city of St. Augustine, in the State of Florida, which was at that time within the said northern district. That subsequently, by an act of Congress of the United States approved the 23d day of July, A.D. 1894, the boundaries of the said northern district of Florida were changed, and the city of St. Augustine, with the contiguous territory, was transferred to the southern district of Florida, whereupon it became and was the duty of the said Charles Swayne to change his residence and reside in the northern district of Florida, as defined by said act of Congress, and to comply with section 551 of the Revised Statutes of the United States, which provides that—

"A district judge shall be appointed for each district, except in cases hereinafter provided. Every judge shall reside in the district for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor."

Nevertheless, the said Charles Swayne, judge as aforesaid, totally disregarding his duty as aforesaid, did not acquire a residence, and within the intent and meaning of said act did not reside in his said district, to wit, the northern district of Florida, from the 23d day of July, A.D. 1894, to the 1st day of January, A.D. 1903, a period of about nine years.

Wherefore the said Charles Swayne, judge as aforesaid, willfully and knowingly violated the aforesaid law, and was and is guilty of a high misdemeanor in office.

ART. 8. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge, as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States, heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 9. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and

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for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days E. T. Davis, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 10. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a judge of a circuit court of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did maliciously and unlawfully adjudge guilty of a contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office of judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 11. That the said Charles Swayne, having been appointed, confirmed, and duly commissioned as judge of the district court of the United States in and for the northern district of Florida, entered upon the duties of said office, and while in the exercise of his office as judge as aforesaid, to wit, while performing the duties of a circuit judge of the United States heretofore, to wit, on the 12th day of November, A.D. 1901, at the city of Pensacola, in the county of Escambia, in the State of Florida, did knowingly and unlawfully adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days Simeon Belden, an attorney and counselor at law, for an alleged contempt of the circuit court of the United States.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office as judge and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

ART. 12. That the said Charles Swayne, having been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, entered upon the duties of his office, and while in the exercise of his office of judge heretofore, to wit, on the 9th day of December, A.D., 1902, at Pensacola, in the county of Escambia, in the State of Florida, did unlawfully and knowingly adjudge guilty of contempt and did commit to prison for the period of sixty days one W. C. O'Neal, for an alleged contempt of the district court of the United States for the northern district of Florida.

Wherefore the said Charles Swayne, judge as aforesaid, misbehaved himself in his office as judge, as aforesaid, and was and is guilty of an abuse of judicial power and of a high misdemeanor in office.

And the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Charles Swayne, judge of the United States court for the northern district of Florida, and also of replying to his answers which he shall make unto the articles herein preferred against him, and of offering proof to the same and every part thereof, and to all and every other article or accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Charles Swayne may be put to answer the high crimes and misdemeanors in office herein charged against him, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

J. G. CANNON,
Speaker of the House of Representatives.

Attest:
A. MCDOWELL, *Clerk.*

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The articles of impeachment were handed to the Secretary of the Senate.

The PRESIDENT pro tempore. The Senate will take proper order in the matter of the impeachment of Judge Swayne, and communicate to the House of Representatives its action.

The managers thereupon withdrew from the Chamber.

Having returned to the House,[34] the managers appeared at the bar, and Mr. Palmer reported orally:

Mr. Speaker, the managers of impeachment beg leave to report to the House that the articles of impeachment prepared by the House of Representatives against Charles Swayne, district judge of the United States in and for the northern district of Florida, have been exhibited and read to the Senate, and the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, due notice of which would be given to the House of Representatives.[35]

2477. The Swayne impeachment continued.

The organization of the Senate for the Swayne impeachment trial.

The oath to the Senators for the Swayne trial was administered by the Chief Justice.

At the request of the President pro tempore the Senate elected a Presiding Officer for the Swayne impeachment trial.

The Senate being organized for the Swayne impeachment, the House was notified by message.

In the Senate, after the retirement of the managers, Mr. Platt, of Connecticut, offered the following resolutions, which were severally agreed to:[36]

Ordered, That the articles of impeachment presented this day by the House of Representatives be printed for the use of the Senate.

Ordered, That at 2 o'clock this afternoon the Senate will proceed to the consideration of the articels of impeachment of Charles Swayne, judge of the United States district court for the northern district of Florida, presented this day.

Ordered, That a committee of two Senators be appointed by the Chair to wait upon the Chief Justice of the United States and invite him to attend in the Senate Chamber at 2 o'clock this day, to administer to Senators the oath required by the Constitution, in the matter of the impeachment of Charles Swayne, or in case of his inability to attend, any one of the associate justices.

In accordance with the last resolution, Messrs. Charles W. Fairbanks, of Indiana, and Augustus O. Bacon, of Georgia, were appointed as the committee.

Later, on the same day, in the Senate,[37] the President pro tempore[38] requested that he be relieved of the duty of presiding at the trial. Thereupon, Mr. John C. Spooner, of Wisconsin, offered this resolution, which was agreed to:

Resolved, That in view of the statement just made to the Senate by the President pro tempore of his inability, because of recent illness, to discharge the duties of his office, other than those involved in presiding over the Senate in legislative and executive session, the Hon. Orville H. Platt, Senator from the State of

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[34] House Journal, p. 195; Record, p. 1310.

[35] The House itself did not attend its managers to the Senate on this occasion or at any other time during the trial.

[36] Senate Journal, p. 121; Record, p. 1283.

[37] Senate Journal, p. 121; Record, p. 1289.

[38] William P. Frye, of Maine, President pro tempore.

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Connecticut, be, and he is hereby, appointed presiding officer on the trial of the impeachment of Charles Swayne, district judge of the United States for the northern district of Florida.

A message announcing this action was transmitted to the House.[39]

At 2 o'clock p. m., on motion of Mr. Platt, of Connecticut, Rule III of the Senate, sitting for impeachment trials, providing that the presiding officer should administer the oath, was suspended.[40]

Then [41] the presence of the Chief Justice of the United States, Hon. Melville W. Fuller, was announced by the Assistant Sergeant-at-Arms.

The Chief Justice entered the Senate Chamber, escorted by Mr. Fairbanks and Mr. Bacon, the committee appointed for the purpose, and was conducted by them to a seat by the side of the President pro tempore.

Mr. FAIRBANKS. Mr. President, the committee appointed by the Senate to wait upon the Chief Justice of the Supreme Court of the United States and request him to administer to Senators the oath required by the Constitution in the matter of the impeachment of Judge Charles Swayne report that they have discharged that duty. The Chief Justice of the Supreme Court, complying with the request of the Senate, is now present in the Senate and ready to administer the oath required to be administered to the members of the Senate sitting in the trial of impeachments.

The Chief Justice administered the oath to the President pro tempore as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Charles Swayne, judge of the district court of the United States for the northern district of Florida, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The PRESIDENT pro tempore. The Senator from Connecticut will please present himself as Presiding Officer of the Senate while in court and take the necessary oath.

Mr. Platt, of Connecticut, advanced to the Vice-President's desk, and the oath was administered to him by the Chief Justice.

The PRESIDENT pro tempore. The Secretary will call the roll, and as their names are called Senators will present themselves at the desk in groups of ten, and the oath will be administered to them.

The oath having been administered to all the Senators present, Mr. Platt, of Connecticut, thereupon took the chair, and announced:

Senators, the Senate is now sitting for the trial of the impeachment of Charles Swayne, judge of the United States district court in and for the northern district of Florida.

Then, on motion of Mr. Charles W. Fairbanks, of Indiana, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Charles Swayne, judge of the United States district court for the northern district of Florida, and is ready to receive the managers on the part of the House at its bar.

This message was delivered in the House soon after.[42]

2478. The Swayne impeachment continued.

Ceremonies of demanding that process issue in the Swayne impeachment.

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[39] House Journal, p. 195; Record, p. 1312.
[40] The Senate had overlooked the law relating to this subject.
[41] Senate Journal, pp. 122, 346; Record, pp. 1289–1290.
[42] House Journal, p. 185; Record, p. 1310.

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The Senate having ordered, on demand of the managers, that process issue against Judge Swayne, the managers returned and reported verbally to the House.

Then, on the same day,[43] in the Senate, at 2 o'clock and 27 minutes p.m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant-at-Arms.

The PRESIDING OFFICER. The Sergeant-at-Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDING OFFICER. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Charles Swayne, United States judge in and for the northern district of Florida.

Mr. Manager Palmer rose and said:

Mr. President, we are instructed by the House of Representatives, as its managers, to demand that the Senate shall issue process against Charles Swayne, district judge of the United States in and for the northern district of Florida, that he answer at the bar of the Senate the articles of impeachment heretofore exhibited by the House of Representatives through its managers.

Then, on motion of Mr. Fairbanks, the following resolutions were severally agreed to:

Ordered, That a summons be issued, as required by the rules of procedure and practice in the Senate when sitting for the trial for impeachment of Charles Swayne, returnable on Friday, the 27th day of the present month, at 1 o'clock in the afternoon.

Ordered, That the Senate, sitting for the trial of impeachment of Charles Swayne, adjourn until Friday, the 27th instant, at 1 o'clock in the afternoon.

The Presiding Officer then said:

The order having been agreed to, the Senate, sitting for the trial of the impeachment, stands adjourned until 1 o'clock on Friday, the 27th instant. The Senate will resume its legislative session.

Mr. Platt, of Connecticut, thereupon vacated the chair, which was resumed by the President pro tempore.

On January 20,[44] in the House, Mr. Palmer, on behalf of the managers, reported orally:

Mr. Speaker, I have the honor to report on behalf of the managers in the matter of the impeachment of Charles Swayne, district judge of the United States in and for the northern district of Florida, that the Senate has organized for the trial of the impeachment; that in the name of the House of Representatives and in behalf of all the people of the United States, the managers have demanded of the Senate that process be issued against Charles Swayne, judge as aforesaid, to answer to the articles hereinbefore exhibited against him at the bar of the Senate, and that the Senate has advised us that process will be issued against him in that behalf returnable on the 27th instant, at 1 o'clock p.m.

2479. The Swayne impeachment continued.

Proceedings on the return of the writ of summons in the Swayne impeachment.

In response to the writ of summons, Judge Swayne entered appearance by his counsel.

In the Swayne impeachment, in response to the motion of respondent's counsel, the Senate granted time after the appearance to present the answer.

[43] Senate Journal, p. 346; Record, p. 1290.
[44] House Journal, p. 205; Record, p. 1415.

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The managers and respondent in the Swayne case were directed to furnish a list of their witnesses to the Sergeant-at-Arms of the Senate.

The oath to Senators in the Swayne impeachment trial was administered by the Presiding Officer after the organization was completed.

On January 27,[45] in the Senate, the President pro tempore said:

The hour of 1 o'clock, to which the Senate sitting as a court in the impeachment of Judge Charles Swayne adjourned, has arrived. Will the Senator from Connecticut [Mr. Platt] please take the chair?

Mr. Platt, of Connecticut, thereupon took the chair as Presiding Officer.

The PRESIDING OFFICER. The Sergeant-at-Arms will make the opening proclamation.

The SERGEANT-AT-ARMS. Hear ye, hear ye, hear ye. All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The PRESIDING OFFICER. The Secretary will now call the names of those Senators who have not been sworn, and such of those Senators as are present in the Chamber will, as their names are called, advance to the desk and take the oath.

The Secretary called the names of the Senators who had not been heretofore sworn, whereupon Senators Blackburn, Depew, Dryden, Knox, and McLaurin advanced to the area in front of the Secretary's desk, and the oath was administered to them by the Presiding Officer.[46]

Mr. Charlesa W. Fairbanks, of Indiana, then offered this resolution, which was agreed to, as follows:

Resolved, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Charles Swayne.[47]

At 1 o'clock and 7 minutes p.m. the Assistant Sergeant-at-Arms announced the managers on the part of the House of Representatives.

The PRESIDING OFFICER. The managers will be admitted and conducted to the seats provided for them within the bar of the Senate.

The managers were conducted to seats provided in the space in front of the Secretary's desk on the left of the Chair, namely: Hon. Henry W. Palmer, of Pennsylvania; Hon. Marlin E. Olmsted, of Pennsylvania; Hon. James B. Perkins, of New York; Hon. Henry D. Clayton, of Alabama; Hon. David A. De Armond, of Missouri, and Hon. David H. Smith, of Kentucky.

At 1 o'clock and 14 minutes p. m. Hon. Anthony Higgins and Hon. John M. Thurston, counsel for the respondent, Charles Swayne, entered the Senate Chamber and were conducted to the seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDING OFFICER. The Secretary will read the minutes of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Charles Swayne.

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[45] Senate Journal, p. 346; Record, pp. 1449–1451.

[46] The House managers called the attention of the Senate to the law permitting the Presiding Officer to administer the oath.

[47] This message was duly received in the House, Record, p. 1479.

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The Secretary read the Journal of proceedings of the Senate, sitting for the trial of the impeachment, of Tuesday, January 24, 1905.

The PRESIDING OFFICER. The Secretary will now read the return of the Sergeant-at-Arms to the summons directed to be served.

The Secretary read the following return appended to the writ of summons:

The foregoing writ of summons, addressed to Charles Swayne, and the foregoing precept, addressed to me, were duly served upon the said Charles Swayne by delivery to and leaving with him true and attested copies of the same at 1215 Tatnall street, Wilmington, Del., the residence of Henry G. Swayne, on Tuesday, the 24th day of January, 1905, at 7 o'clock and 45 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant-at-Arms United States Senate.

The PRESIDING OFFICER. The Secretary will now administer to the Sergeant-at-Arms an oath in support of the truth of his return.

The Secretary (Mr. Charles G. Bennett) administered the following oath to the Sergeant-at-Arms:

You, Daniel M. Ransdell, Sergeant-at-Arms of the Senate of the United States, do solemnly swear that the return made by you upon the process issued on the 24th day of January, 1905, by the Senate of the United States against Charles Swayne, is truly made and that you have performed such service as therein described: So help you God.

The SERGEANT-AT-ARMS. I do so swear.

The PRESIDING OFFICER. The Sergeant-at-Arms will make proclamation.

The SERGEANT-AT-ARMS. Charles Swayne, Charles Swayne, Charles Swayne, judge of the district court of the United States for the northern district of Florida: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

Mr. HIGGINS. Mr. President, on behalf of the respondent, Charles Swayne, I beg to enter the following appearance:

To the honorable the Senate of the United States, sitting as a Court of Impeachment:

I, Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, now present in the city of Washington, having been served with a summons to be in the city of Washington on the 27th day of January, 1905, at 1 o'clock afternoon, to answer certain articles of impeachment presented against me by the honorable the House of Representatives of the United States, do hereby enter my appearance by my counsel, Anthony Higgins and John M. Thurston, who have my warrant and authority therefor, and who are instructed by me to ask this court for a reasonable time for the preparation of my answer to said articles.

CHARLES SWAYNE.

Dated at Washington, D.C., this 27th day of January, A. D. 1905.

I ask this be filed, and I submit a copy for the managers.

The PRESIDING OFFICER. It will be placed on file.

Mr. THURSTON. On behalf of the respondent we make the following motion:

In the Senate of the United States, sitting as a court of impeachment. The United States of America *v.* Charles Swayne. Upon articles of impeachment presented by the House of Representatives of the United States of America.

The respondent, by his counsel, now comes and moves the court to grant him the period of seven days in which to prepare and present his answer to the articles of impeachment presented against him herein.

ANTHONY HIGGINS.
JOHN M. THURSTON.

Then, on motion of Mr. Fairbanks, it was

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on the 3d day of February next.

Also, on motion of Mr. Fairbanks, at the suggestion of the managers, it was

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Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock post meridian.

A proposition of the managers that the trial proceed on the 13th of February was objected to by counsel for respondent, who suggested the 10th of February instead, and it was not pressed.

Then, on motion of Mr. Fairbanks, the Senate, sitting for the trial of the impeachment, adjourned until Friday, February 3, 1905, at 12:30 o'clock p.m.

The managers on the part of the House and the counsel for the respondent withdrew from the Chamber.

The President pro tempore resumed the Chair.

2480. The Swayne impeachment continued.

Forms and ceremonies in the Senate at the session for receiving respondent's answer in the Swayne case.

Proclamation of the Sergeant-at-Arms at opening of session of the Senate sitting for the Swayne impeachment trial.

At the presentation of the answer in the Swayne case the respondent was represented by his counsel.

Rule of the Senate in the Swayne trial for submitting of requests or applications by managers or counsel.

Rule governing the Senators in the Swayne trial as to colloquys and questions.

On Februray 3,[48] in the Senate,

The PRESIDENT pro tempore (at 12 o'clock and 30 minutes p.m.). The hour has arrived to which the Senate sitting as a court of impeachment adjourned, and the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER (Mr. Platt, of Connecticut). The Senate is now sitting for the trial of the impeachment of Charles Swayne, a judge of the United Stakes in and for the northern district of Florida. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made proclamation as follows:

Hear ye, hear ye, hear ye. All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives of the United States against Charles Swayne, judge of the district court of the United States in and for the northern district of Florida.

The oath was then administered to certain Senators not previously sworn.

The PRESIDING OFFICER. The Sergeant-at-Arms will notify the managers, if they are in waiting, that the Senate is ready to proceed.

At 12 o'clock and 32 minutes p.m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The PRESIDING OFFICER. The Sergeant-at-Arms will also notify the counsel for the respondent.

Mr. Anthony Higgins and Mr. John M. Thurston, counsel for the respondent, entered the Chamber and were assigned to the seats provided for them in the area in front of the Secretary's desk.

[48] Senate Journal, p. 347; Record, pp. 1818–1832.

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The PRESIDING OFFICER. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

The Journal of the proceedings of the Senate sitting as a court on Friday, January 27, 1905, was read and approved.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise, the managers on the part of the House, or the counsel representing the respondent, may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

It shall not be in order for any Senator to engage in colloquy, or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

2481. The Swayne impeachment continued.

The answer of Judge Swayne to the articles of impeachment.

Judge Swayne's answer was signed by himself and his counsel.

The answer of Judge Swayne as to the first seven articles raised a question as to the jurisdiction of the Senate to try the charges.

Then Mr. Thurston, of counsel for the respondent, said:

Mr. President, counsel for the respondent now come, and for answer of said Charles Swayne under impeachment herein say:

And the said Charles Swayne, named in said articles of impeachment, comes before the honorable Senate of the United States, sitting as a court of impeachment, and says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said first article, the said respondent, saving to himself all advantages of exception to said first article, for answer thereto saith:

He admits that on the 20th day of April, 1897, at Waco, in the State of Texas, acting as United States judge in and for the northern district of Florida, he made and presented to R. N. Love, the United States marshal in and for the northern district of Texas, the certificate in writing as set forth in the said first article, and did then and there receive from the said R. N. Love, United States marshal as aforesaid, the sum of $230 in full payment of the account certified to as aforesaid, and the respondent says that he then and there believed, and still believes and insists, that, under the true meaning and intent of the statutes of the United States allowing the expenses of a district judge of the United States for travel and expenses while holding court outside of his own district, the said claim was just and in strict accordance with the provisions of the law of Congress in that respect enacted; and he denies that he then and there knew or believed said claim to be false, as set forth in said article; and he denies that he signed and presented the said certificate for the purpose of obtaining payment of any false claim; and he denies that he then and there made and used a false certificate knowing or believing said certificate to be false. [Etc., specifying at length.]

* * * And respondent says that he attaches to this, his answer to the said article 1, copies of certificates of the honorable the Secretary of the Treasury, marked, respectively, Exhibits A et seq., and asks that the same be accepted and taken as a part of this his answer to the said article 1. * * *

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These exhibits were attached, not at the end of the answer, but at the end of article first.

To articles second and third, which related to the offense set forth in article 1, answer was made in similar form.

As to article 4, the answer says:

And the said Charles Swayne, named in the articles of impeachment, says that this honorable court ought not to have or take further cognizance of the fourth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in the said fourth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said fourth article, the said respondent, saving to himself all advantages of exception to said fourth article, for answer thereto saith:

He admits that he was duly appointed, confirmed, and commissioned as a district judge of the United States in and for the northern district of Florida, and that he had entered upon the duties of his office prior to 1893 and had continued in the performance of the duties and in the exercise of his office of judge up to the present time.

He denies that at the time specified in said article 4, to wit, A.D. 1893, he did unlawfully appropriate to his own use, without making compensation to the owner, a certain railway car belonging to the Jacksonville, Tampa and Key West Railroad Company, for the purposes stated in said article 4, or for any other purpose or purposes whatsoever; and as to the true facts of the transaction referred to in said article 4, he says, etc.

To article 5, which related to the same offense as article 4, a similar answer was given.

As to article 6 the answer was:

And the said Charles Swayne, named in said articles of impeachment, says that this honorable court ought not to have or take further cognizance of the sixth of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said sixth article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a court of impeachment, as to said sixth article, the said respondent, saving to himself all advantages of exceptions to said sixth article, for answers thereto saith:

He admits that prior to the year 1900 he had been duly appointed, confirmed, and commissioned as judge of the United States in and for the northern district of Florida, and had entered upon the duties of his office, and that he was in the exercise of his office as judge as aforesaid at all times in the said article specified and as therein alleged.

The respondent denies that he did not acquire a residence in the northern district of Florida and did not, within the intent and meaning of the five hundred and fifty-first section of the Revised Statutes of the United States, reside in said district from the 23d day of July, 1894, to the 1st day of October, 1900; and denies that he violated said section; and denies that he was and is guilty of a high misdemeanor in office as charged in said article 6.

The respondent further says, etc.

As to article 7, which related to the same offense as set forth in article 6, the answer is similar.

As to the remaining articles, relating to the contempt cases, the answer begins as to each with a saving clause, and proceeds generally as follows:

And the said respondent, saving to himself all advantages of exception or otherwise to article 8 of the said articles of impeachment, for answer thereto saith:

He admits that prior to the 12th day of November, A.D. 1901, he had been duly appointed, confirmed, and commissioned as a district judge of the United States

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in and for the northern district of Florida, and had entered upon the duties of his office prior to said date, and continued in the performance of the duties and in the exercise of his office of judge up to the present time, and he says that at all the times mentioned in said article 8 he was exercising and performing the duties of a district judge in and for the northern district of Florida, and that on the 12th day of November, A.D. 1901, he was holding a session of the district and circuit court of said district at the city of Pensacola, in the State of Florida, and he admits that on said date he did adjudge guilty of contempt of court and impose a fine of $100 upon and commit to prison for a period of ten days one E. T. Davis, an attorney and counselor at law, as set forth in said article 8, but he denies that said judicial action on his part was malicious or unlawful, and, on the contrary, he insists and asserts that said judgment was rendered and said sentence imposed by him from a high sense of judicial and public duty, and that upon the proceedings then pending and heard before him he could not have done otherwise than to have adjudge the said E. T. Davis guilty of the contempt of court stated in said article 8.

Respondent, further answering, says, etc.

And in conclusion the form of the answer was:

And this respondent, in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully reserves leave to amend and add to the same from time to time as may become necessary or proper and when said necessity and propriety shall appear.

CHAS. SWAYNE.

ANTHONY HIGGINS,
JOHN M. THURSTON,
Of Counsel for Respondent.

2482. The Swayne impeachment continued.

Forms of procedure of authorizing, preparing, and presenting the replication in the Swayne impeachment trial.

Mr. Manager Palmer then asked [49] that the following order be agreed to:

Ordered, That the managers have time until Monday next, at 2 p.m., to consult the House of Representatives on the subject of filing exceptions, demurrer, or replication to the answer of the respondent, and that they be furnished with a copy of the said answer.

Mr. Charles W. Fairbanks, a Senator from Indiana, proposed instead an order which, after a reference to the precedent of the Belknap trial, and some modification as to time, was agreed to as follows:

Ordered, That the managers on the part of the House be allowed until the 6th day of February instant at 2 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent respectively, so that all pleadings shall be closed on or before the 9th day of February instant, and that the trial shall proceed on the 10th day of February instant, at 2 o'clock p.m.

Then, on motion of Mr. Manager Palmer, the following order was agreed to:

Ordered, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment, and also a copy of the foregoing order.

After an order had been made for printing the articles and the answer as documents, the Senate, "sitting as a court of impeachment," [50] adjourned until Monday, February 6, 1905, at 2 o'clock p.m.

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[49] Senate Journal, p. 359; Record, p. 1831.
[50] These words appear in the Record. The Senate Journal (p. 359) speaks of the "Senate sitting for the trial."

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The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

On February 4[51] a message from the Senate transmitted to the House an attested copy of the respondent's answer, which was referred to the managers.

The message also transmitted the resolution of the Senate fixing a time for the filing of the replication and further pleadings.

On February 6[52] in the House, Mr. Palmer, from the managers, reported the following replication, which was agreed to without debate or division:

Replication of the House of Representatives of the United States of America to the answer of Charles Swayne, judge of the United States in and for the northern district of Florida, to the articles of impeachment exhibited against him by the House of Representatives.

The House of Representatives of the United States have considered the several answers of Charles Swayne, district judge of the United States in and for the northern district of Florida, to the several articles of impeachment against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantage of exception to the insufficiency, irrelevancy, and impertinency of his answers to each and all of the several answers of impeachment exhibited against the said Charles Swayne, judge as aforesaid, do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, crimes, or misdemeanors charged against Charles Swayne in said articles of impeachment or either of them; and for replication to said answer, do say that said Charles Swayne, district judge of the United States in and for the northern district of Florida, is guilty of the high crimes and misdemeanor mentioned in said articles, and that the House of Representatives are ready to prove the same.

Then, on motion of Mr. Palmer, it was also—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Charles Swayne, judge of the northern district of Florida, to the articles of impeachment exhibited against him and that the same will be presented to the Senate by the managers on the part of the House.

And also, that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

This message was communicated to the Senate very soon thereafter,[53] and received during the legislative session.

On the same day, at 2 p.m., the Senate[54] went into session for the trial in the usual form, and after the reading of the Journal, the Presiding Officer laid before the Senate sitting for the trial the message which had been received during the legislative session.

Thereupon Mr. Palmer, for the managers, who were in attendance, presented and read the replication.

Thereupon the Presiding Officer asked:

Have the managers anything further to offer?

Mr. Manager Palmer replied:

Nothing to offer to-day, sir.

The Presiding Officer then said:

Have counsel for the respondent anything to offer?

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[51] House Journal, p. 259; Record, p. 1887.
[52] House Journal, p. 262; Record, p. 1939.
[53] Senate Journal, p. 174; Record, p. 1915.
[54] Senate Journal, p.360; Record, p. 1922.

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Mr. Higgins replied:

Should we be advised there is anything further to offer we assume it can be done without a formal meeting of the Senate. It would be merely to join issue, in technical phrase.

The Presiding Officer rejoined:

It may, under the order which has already been adopted, be filed with the Secretary.

Then, on motion of Mr. Augustus O. Bacon, a Senator from Georgia, it was—

Ordered, That the Senate sitting in the trial of impeachment of Charles Swayne adjourn until Friday, the 10th instant, at 1 o'clock p.m.

2483. The Swayne impeachment continued.

Forms and ceremonies in the Swayne trial during the presentation of testimony.

The House of Representatives, although invited by the Senate, did not at any time attend the Swayne trial.

The respondent attended during the presentation of testimony and the arguments in the Swayne trial.

Instance wherein a witness was examined on the question of issuing process for a witness in the Swayne trial.

On February 10,[55] in the Senate sitting for the trial, Mr. Augustus O. Bacon, a Senator from Georgia, presented the following resolution, which was agreed to:

Ordered, That the pleadings in the matter of the impeachment of Charles Swayne having been closed, the Secretary inform the House of Representatives that the Senate is ready to proceed with the trial of said impeachment according to the rule heretofore communicated to the House, and that provision has been made for the accommodation of the House of Representatives and its managers in the Senate Chamber.[56]

At 1 o'clock and 5 minutes p.m. the managers on the part of the House of Representatives were announced, and they were conducted by the Assistant Sergeant-at-Arms to the seats assigned them in the area in front of the Secretary's desk.

The respondent, Charles Swayne, accompanied by his counsel, Mr. Anthony Higgins and Mr. John M. Thurston, entered the Chamber and took the seats provided for them in the area in front of the Secretary's desk.

The Presiding Officer. The Journal of the proceedings of the last session of the Senate sitting for the trial of the impeachment of Charles Swayne will now be read.

The Journal of the proceedings of the Senate sitting as a court on Monday, February 6, 1905, was read and approved.

The Presiding Officer. The Presiding Officer will inquire of the Sergeant-at-Arms whether the names of the witnesses have been furnished him by the managers on the part of the House and by the counsel for the respondent, and whether these witnesses have been summoned for attendance at this time?

The Sergeant-at-Arms. Mr. President, the names of the witnesses for both the managers on the part of the House of Representatives and the respondent have been furnished me and have been served, and many of the witnesses are now in the city.

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[55] Senate Journal, p. 360; Record, p. 2229.

[56] No action was taken by the House, and it did not attend the proceedings at any time.

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Then, on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, the following orders were severally agreed to:

Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Charles Swayne be printed daily for the use of the Senate as a separate document.

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Charles Swayne, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon and continue until 5 o'clock in the afternoon.

Then, on suggestion of Mr. Manager Palmer, the names of the witnesses were called over to acertain their presence.

Then Mr. Manager Palmer stated:

Mr. President, in the case of Joseph H. Durkee, of Jacksonville, Fla., we have a certificate of a physician stating that he is not able to attend. The certificate was sent to the Presiding Officer and by him handed to me, and it has been exhibited to counsel on the other side.

Mr. Durkee is a witness who has been subpoenaed by both sides, and is a material and important witness. I have a witness present who will testify with respect to Mr. Durkee's present condition, and I ask that Mr. B. S. Liddon be summoned to testify what Mr. Durkee's present condition is, for the purpose of moving for an attachment.

Thereupon Mr. Liddon was examined under oath; and then the Presiding Officer announced that the Senate would take into account the issuance of an attachment.

Then Mr. Manager Palmer opened the case for the House of Representatives, setting forth what the managers expected to prove.

Then the introduction of testimony on behalf of the managers began.

This presentation of testimony continued until February 20,[57] when Mr. Manager Marlin E. Olmsted, of Pennsylvania, announced that the case of the managers was in.

Immediately thereafter Mr. Anthony Higgins, of counsel for the respondent, proceeded [58] with the opening address in respondent's case. He not only outlined the defense, but entered somewhat into argument on the legal features of the case. Mr. Higgins consumed the remainder of the session on that day, and spoke some time the next day.[59]

The introduction of testimony on behalf of the respondent then began and continued from day to day.

On February 23 [60] the Senate agreed to the following:

Ordered, That the session of the Senate sitting this day in the trial of the impeachment of Charles Swayne shall continue until 6 o'clock, when a recess shall be taken until 8 o'clock, and the session shall be continued until 10 o'clock unless otherwise ordered.

2484. The Swayne impeachment continued.

The Senate limited the time of the final arguments in the Swayne impeachment trial.

The Senate, after deliberation, permitted written arguments to be filed in the Swayne case, but only in such way as would permit reply.

Rebuttal evidence was offered by the managers in the Swayne trial.

Order of final arguments in the Swayne case.

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[57] Senate Journal, p. 363; Record, p. 2909.
[58] Record, pp. 2909–2915.
[59] Record, pp. 2975–2979.
[60] Record, p. 3142.

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On the same day,[61] Mr. Charles W. Fairbanks, a Senator from Indiana, offered the following:

Ordered, That the managers be allowed five hours for the argument of the case, the time to be divided between them as they may agree, but the concluding oral argument shall be by one manager and shall not exceed one hour.

Ordered, That counsel for the respondent be allowed five hours for the argument of the case, the time to be divided between them as they may agree.

These orders were agreed to, but presently the vote was reconsidered on suggestion that the managers would prefer a different division of their time, so that the closing argument might be longer than an hour. So an amendment was adopted to provide that the closing argument by the manager should not exceed one hour and forty minutes. As amended the order was then agreed to.

Thereupon Mr. Manager Henry W. Palmer, of Pennsylvania, offered the following motion:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript, may deliver a copy of the same to the reporter, and any portion thereof which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion.

Mr. Palmer explained the reasons for this motion:

I wish to explain the reason why we ask for this privilege. We have made no objection to curtailing the time, though this is the first time in the history of impeachment trials where the time of the managers has been curtailed. To be sure, the rule of the Senate provides that a case shall be closed by two managers, but there has never been any limit of time. We have consented to curtail the time of the gentlemen who are to speak in this case so that some of them shall have forty-five, some fifty, and some sixty minutes. Of course they will not be able to go over the case and do themselves or the case justice in that length of time. Their arguments can be printed in the Record and can be read afterwards by anybody who desires to read them.

Again, it was ordered by the Senate the other day that a brief on the part of the counsel for respondent should be printed, and a brief of 48 pages was printed about ten days ago, but we never got a chance to look at it until this morning, when it was printed in the Record. That brief pertains to jurisdictional affairs, and it is particularly desired to print a brief of the law of the case to meet the brief on the part of the gentlemen on the other side.

In the course of argument by Senators, Mr. John C. Spooner, of Wisconsin, said:

I can see no objection to the publication or the printing in the Record of any argument on one side which the other side seasonably will have opportunity to pursue and to answer.

This is a case which involves, of course, the interests of the people. It involves vitally the interests of the respondent. Whether technically this is a court or not, it pronounces a sentence or judgment. It is a court or a tribunal of first instance and of last resort. There is no appeal from its decision. If it commits an error, there is no reviewing tribunal.

Nowhere in any judicial tribunal in the country, I think, in a matter involving not simply the right to hold an office, but the right ever to hold an office of honor, trust, or emolument, would it be tolerated that an argument should be made and communicated to the court without opportunity to counsel on the other side to reply to it as fully as they might be advised.

Now, if the managers have some argument to submit in answer to the brief which is printed in the Record this morning, that, I should think, would be entirely proper to be printed, but that the managers shall be permitted to submit to the Senate, after the counsel for the respondent have finished their argument,

[61] Record, pp. 3142–3145.

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further argument on any of these charges or these articles I think is against the justice of judicial procedure.

Mr. John W. Daniel, of Virginia, said:

Mr. President, my disposition would be to vote for any reasonable request made by the managers or by counsel for the respondent here, but I could under no circumstances vote affirmatively on that request. In my opinion it violates the fundamental principles of English and American law. Every accused person is entitled to be present with his counsel, to have an opportunity to hear every charge and every word of argumentative speech that is made against him, and also to have opportunity to respond thereto. It seems to me that a statement of the case carries enforcement of its justice. If that request were granted a most serious and grave argument might appear in print after his case was heard, presenting it in aspects which had not occurred either to the accused, to his counsel, or to any of his judges.

In response to these suggestions the proposed order was modified and agreed to as follows:

That any of the managers or counsel for respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the reporter, and any portion thereof, which for lack of time or to save the time of the Senate, the managers or counsel shall omit to deliver or read, shall be incorporated by the reporter as part of the argument delivered, and any manager who does not address the court may file an argument before the close of the discussion: *Provided*, That all briefs and arguments shall be printed before the closing argument for the respondent begins.

On February 23,[62] at the evening session, counsel for the respondent announced that their case was closed.

The managers then began the presentation of rebuttal evidence.

The rebuttal evidence being concluded, and the managers having, in accordance with permission already given, submitted a brief to be printed, Mr. John M. Thurston, of counsel for the respondent, on this day (February 23)[63] offered on behalf of the respondent, and by reason of the approaching end of the Congress with consequent pressure of legislative business, to submit the case without argument. This offer was declined by the managers.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, then began the arguments in closing.

On February 24[64] Mr. Manager James B. Perkins, of New York, argued; and was followed by Messrs. Managers Henry D. Clayton, of Alabama, and Samuel L. Powers, of Massachusetts, and they were followed on the same day by Mr. Anthony Higgins, of counsel for the respondent.

On February 25[65] Mr. John M. Thurston, of counsel for the respondent, argued; and then, on the same day, Mr. Manager David A. De Armond, of Missouri, closed the case for the House of Representatives and the people.

2485. The Swayne impeachment continued.

The Senate in secret session framed the rule for voting on the articles impeaching Judge Swayne.

The respondent did not attend when the articles in the Swayne case were voted on in the Senate.

Forms of voting on the articles and declaring the result in the Swayne impeachment.

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[62] Record, p. 3178.
[63] Record, p. 3181.
[64] Record, pp. 3246–3265.
[65] Record, pp. 3365–3383.

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Judgment of acquittal entered in the Swayne case by direction of the Presiding Officer.

The Swayne trial being concluded, the Senate, on motion, adjourned without day.

The Senate announced to the House by message the acquittal of Judge Swayne.

Then, on the same day,[66] on motion of Mr. Charles W. Fairbanks, a Senator from Indiana, it was ordered that the doors be closed for deliberation.

The managers on the part of the House, the respondent, and counsel for the respondent retired from the Chamber.

The Senate proceeded to deliberate with closed doors, and at the expiration of one hour and thirty-five minutes the doors were reopened.

While the doors were closed,

Mr. Augustus O. Bacon, of Georgia, submitted the following resolution, which was agreed to:

Resolved, That on Monday next, the 27th day of February, at 10 o'clock a. m., the Senate shall proceed to vote, without debate, on the several articles of impeachment. The Presiding Officer shall direct the Secretary to read the several articles of impeachment in their regular order. After the reading of each article the Presiding Officer shall put the question following: "Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?" The Secretary will proceed to call the roll for the response of Senators.

Whereupon, when his name is called, each Senator shall arise in his place and give his response "guilty" or "not guilty," and the Secretary shall record the same.

Resolved, That the Secretary notify the House of Representatives of the foregoing.

On February 27,[67] in the Senate, the following occurred:

The PRESIDENT pro tempore. The hour of 10 o'clock having arrived, to which the Senate sitting in the impeachment trial adjourned, the Senator from Connecticut will please take the chair.

Mr. Platt, of Connecticut, assumed the chair.

The PRESIDING OFFICER. (Mr. Platt, of Connecticut). The Senate is now sitting in the impeachment trial of Charles Swayne. The Sergeant-at-Arms will make proclamation.

The Sergeant-at-Arms made the usual proclamation.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the managers on the part of the House are in attendance.

The managers on the part of the House (with the exception of Mr. Powers, of Massachusetts, and Mr. Perkins) appeared and were conducted to the seats assigned them.

The PRESIDING OFFICER. The Sergeant-at-Arms will see if the respondent and his counsel are in attendance.

Mr. Higgins and Mr. Thurston, the counsel for the respondent, entered the Chamber and took the seats assigned them.

The PRESIDING OFFICER. The Journal of the last trial day will be read.

The Journal of the proceedings of the Senate sitting for the trial of the impeachment of Charles Swayne Friday, February 24, was read.

The PRESIDING OFFICER. The Secretary will read the first article of impeachment exhibited by the House of Representatives against Charles Swayne.

The Secretary read the first article of impeachment, as follows: * * *

The article having been read, the Presiding Officer put the question:

Senators, how say you, is the respondent, Charles Swayne, guilty or not guilty as charged in this article?

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[66] Senate Journal, p. 365; Record, p. 3383.
[67] Senate Journal, pp. 365–369; Record, pp. 3467–3472.

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The roll was then called, Senators answering "guilty" or "not guilty." In the same manner the verdict was taken on each article, with result as follows:

	Guilty	Not guilty
Article I	33	49
Article II	32	5[illegible]
Article III	32	5[illegible]
Article IV	13	6[illegible]
Article V	13	69
Article VI	31	5[illegible]
Article VII	19	6[illegible]
Article VIII	31	51
Article IX	31	5[illegible]
Article X	31	51
Article XI	31	5[illegible]
Article XII	35	4[illegible]

After the vote on the first article the Presiding Officer announced:

Senators, upon Article 1 of the impeachment of Charles Swayne 33 Senators have voted "guilty" and 49 Senators have voted "not guilty." Two-thirds of the Senators present not having voted "guilty," Charles Swayne, the respondent, stands acquitted of the charges contained in the first article.

A similar announcement was made after the vote on each article.

At the conclusion of the voting, after the result on the twelfth article had been recorded, the Presiding Officer said:

The Presiding Officer, following the precedent in the Belknap impeachment case, calls the attention of the Senate to the twenty-second rule of procedure and practice in the trial of impeachments, which provides:

"And if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State."

If there is no objection, the Presiding Officer will direct the Secretary to enter a judgment of acquittal according to the rule. The Chair hears no objection. The Secretary will read it.

The Secretary read as follows:

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the charges in said articles made and set forth.

Mr. Charles W. Fairbanks, of Indiana, said:

Mr. President, I move that the Senate sitting for the trial of the impeachment of Charles Swayne adjourn without day.

The motion was agreed to; and (at 11 o'clock and 40 minutes a.m.) the Senate sitting upon the trial of the impeachment of Charles Swayne adjourned without day.

The managers on the part of the House and the counsel for the respondent retired from the Chamber.

The President pro tempore resumed the chair.

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On the same day,[68] in the House, this message was received:

IN THE SENATE OF THE UNITED STATES,
FEBRUARY 27, 1905.

The Senate having tried Charles Swayne, judge of the district court of the United States for the northern district of Florida, upon twelve several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore.

Ordered and adjudged, That the said Charles Swayne be, and he is, acquitted of the charges in said articles made and set forth.

Attest:

CHARLES G. BENNETT, *Secretary*.

The managers made no report to the House.

[68] House Journal, p. 393; Record, 3593.

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Impeachment Proceedings Not Resulting in Trial[1]

1. **Inquiries into the conduct of judges:**
   - George Turner in 1796. Section 2486.
   - Peter B. Bruin in 1802. Section 2487.
   - Harry Toulmin in 1811. Section 2488.
   - William P. Van Ness, Mathias B. Talmadge, and William Stephens in 1818. Section 2489.
   - Joseph L. Smith in 1825 and 1826. Section 2490.
   - Buckner Thurston in 1825 and 1837. Section 2491.
   - Alfred Conkling in 1829. Section 2492.
   - Benjamin Johnson in 1833. Section 2493.
   - P. K. Lawrence in 1839. Section 2494.
   - John C. Watrous in 1852 and following years. Sections 2495–2499.
   - Thomas Irwin in 1859. Section 2500.
   - A Justice of the Supreme Court in 1868. Section 2503.
   - Mark H. Delahay in 1872. Sections 2504, 2505.
   - Edward H. Durell in 1873. Sections 2506–2509.
   - Charles T. Sherman in 1873. Section 2511.
   - Richard Busteed in 1873. Section 2512.
   - William Story in 1874. Section 2513.
   - Henry W. Blodgett in 1879. Section 2516.
   - Aleck Boarman in 1890. Sections 2517, 2518.
   - J. G. Jenkins in 1894. Section 2519.
   - Augustus J. Ricks in 1895. Section 2520.
2. **Inquiry as to conduct of Collector of Port of New York. Section 2501.**
3. **Investigation of charges against Vice-President Colfax. Section 2510.**
4. **Inquiry as to consular officers at Shanghai. Sections 2514, 2515.**

2486. The inquiry into the conduct of Judge George Turner in 1796.

In 1796 the House discontinued impeachment proceedings against a Territorial judge on assurance that he would be prosecuted in the courts.

Opinion of Attorney-General Charles Lee as to impeachment of a Territorial judge holding office during good behavior.

Advice of Attorney-General Lee as to mode of instituting and continuing impeachment proceedings.

On receipt of a petition containing charges against a judge, the House, in 1796, instituted an investigation.

On April 25, 1796,[2] a petition was presented in the House from sundry inhabitants of the county of St. Clair, in the Territory northwest of the Ohio River, stating certain grievances and inconveniences to which they had been subjected by the unwarrantable conduct of George Turner, one of the judges of the said Territory, in the exercise

[1] Hinds' Precedents, vol. 3, p. 981 (1907).
[2] First session Fourth Congress, Journal, p. 522; American State Papers (miscellaneous), Vol. I, p. 151.

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of his official duties, and praying that such relief might be granted in the premises as should seem meet to the wisdom of Congress. This petition specified that the judge held a court "unknown to and contrary to the laws of the Territory" at a remote and inconvenient place; that he imposed heavy fines and forfeitures; that he denied the right reserved to the people by the constitution of the Territory, especially as regarded the descent and conveyance of property, and the use of the French language; and that he managed the affairs of interstate persons to the damage of the heirs and creditors.

The House referred to petition to a committee composed of Messrs. Theophilus Bradbury, of Massachusetts; Nichols Gilman, of New Hampshire; Thomas Hartley, of Pennsylvania; John Heath, of Virginia, and Alexander D. Orr, of Kentucky.

On May 5,[3] the committee was discharged from further consideration of the petition and the same was referred to the Attorney-General for his opinion thereon.

On May 9[4] Charles Lee, the Attorney-General, transmitted his opinion:

That the charges exhibited in the petition against Judge Turner, and especially the first, second, and fifth, are of so serious a nature as to require that a regular and fair examination into the truth of them should be made, in some judicial course of proceeding; and if he be convicted thereof, a removal from office may and ought to be a part of the punishment. His official tenure is during good behavior; and, consequently, he cannot be removed until he be lawfully convicted of some malversation in office. A judge may be prosecuted in three modes for official misdemeanors or crimes: by information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States. The last mode, being the most solemn, seems, in general cases, to be best suited to the trial of so high and important an officer; but, in the present instance, it will be found very inconvenient, if not entirely impracticable, on account of the immense distance of the residence of the witnesses from this city [Philadelphia]. In the prosecution of an impeachment, such rules must be observed as are essential to justice; and, if not exactly the same as those which are practiced in ordinary courts, they must be analogous, and as nearly similar to them as forms will permit. Thus, before an impeachment is sent to the Senate, witnesses must be examined, in solemn form, respecting the charges, before a committee of the House of Representatives, to be appointed for that purpose, as in a case of indictment witnesses are examined by a grand jury. Upon the trial the witnesses must give their testimony before the Senate, as in a case of indictment they do before the ordinary court and petit jury; so, also, perhaps, it would be proper that some responsible person or persons should undertake to answer the costs of trial to the accused, in the event of his acquittal. It ought to be remarked that, if the mode of impeachment be deemed preferable, the aforesaid petition, subscribed by forty-nine citizens, may be regarded as sufficient inducement to the House to appoint a committee of inquiry, with authority to examine witnesses and report the substance of their testimony respecting the charge therein set forth, at the present or next session; and, if the report of the testimony will warrant an impeachment, articles are to be directed to be drawn and presented to the Senate, who will appoint a time of trial, giving reasonable notice thereof to the accused and to the accusers, etc.

However, the Attorney-General is of opinion that it will be more advisable, on account of the expense, the delay, the certain difficulty, if not impossibility, of obtaining the attendance here of the witnesses who reside in the Territory northwest of the Ohio, about the distance of 1,500 miles, that the prosecution should not be carried on by impeachment, but by information on indictment before the supreme court of that Territory, which is competent to the trial; and he prays leave to inform the House that, in consequence of affidavits stating complaints against Judge Turner, of oppressions and gross violations of private

[3] Journal, p. 539.
[4] American State Papers (miscellaneous), Vol. I, p. 151.

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property, under color of his office, which have been lately transmitted to the President of the United States, the Secretary of State has been by him instructed to give orders to Governor St. Clair to take the necessary measures for bringing that officer to a fair trial, respecting those charges, before the court of that Territory, according to the laws of the land; which course is also recommended to be pursued relative to the matters charged in said petition.

Judge Turner was one of three supreme court judges, "any two of whom to form a court, who shall have a common-law jurisdiction, * * * and their commissions shall continue in force during good behavior." [5]

The report of the Attorney-General was, on May 10,[6] referred to a committee composed of the same members originally appointed to consider the petition, and they were directed to "examine the matter thereof, and report the same, with their opinion thereupon, to the House."

On February 16, 1797,[7] a memorial was presented from Judge Turner praying that the House enter upon an investigation of the allegations and charges brought against him in the petition. On February 22 [8] this memorial was referred to the same committee.

On February 27 [9] that committee reported that the case should come to a hearing before the court of the Territory, where the judge would have an opportunity of defending himself.

The report was laid on the table and not acted on further.[10]

2487. The inquiry into the conduct of Judge Peter B. Bruin, in 1808.

Instance of proceedings looking to the impeachment of a judge of a Territory.

The investigation of Judge Bruin's conduct was set in motion by charges preferred by a Territorial legislature.

The House in the Bruin case declined to impeach before it had made an investigation by its own committee.

Instance wherein a Delegate was made chairman of a committee to investigate the conduct of a judge.

On April 11, 1808 [11] the Speaker presented to the House sundry resolutions of the legislative council and house of representatives of the Mississippi Territory, preferring certain charges against Peter B. Bruin, presiding judge of the Territory, and instructing Mr. George Poindexter, Delegate in Congress from the said Territory, to impeach the said judge, and pledging themselves, "in behalf of the people of this Territory, to substantiate and make good" the said charges, which were specified as "neglect of duty and drunkenness on the bench."

Mr. Poindexter thereupon presented resolutions as follows:

Resolved, That a committee be appointed to prepare and report articles of impeachment against Peter B. Bruin, one of the judges of the superior court of the Mississippi Territory; and that the said committee have power to send for persons, papers, and records.

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[5] Organic law of Northwest Territory, 1 Stat. L., pp. 51, 286.
[6] Journal, p. 548.
[7] Second session, Journal, p. 701.
[8] Journal, p. 714.
[9] Journal, p. 724: Annals, p. 2320, 8.
[10] It appears that Jonathan Return Meigs was appointed Judge on February 12, 1798, but the records of the State Department do not show whose place he took. The appointment of Judge Meigs was made two years after the proceedings in the House against Judge Turner.
[11] First session Tenth Congress, Journal, p. 204; Annals, p. 2068; American State Papers miscellaneous), Vol. I, pp. 921, 922.

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In the debate it was objected by Mr. Timothy Pitkin, jr., of Connecticut, that it would hardly be dignified for the Congress to proceed to an impeachment on the authority of a resolution of the legislature of a State or Territory. A committee should first be appointed to inquire into the propriety of impeaching. Mr. John Rhea, of Tennessee, drew a distinction between the legislature of a State and that of a Territory, and, furthermore, did not consider the resolutions of a legislature conclusive evidence of fact.

Thereupon Mr. Poindexter modified his resolution by striking out the words "prepare and report," and inserting the words "inquire into the expediency of preferring." He further stated that he had seen Judge Bruin on the bench in a state of intoxication.

On April 18 [12] the House further amended the resolution, and agreed to it, as follows:

Resolved, That a committee be appointed to inquire into the conduct of Peter B. Bruin, a judge of the superior court of the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the Constitutional powers of this House; and that the said committee have power to send for persons, papers, and records.

The committee were appointed as follows: Messrs. Poindexter, Samuel W. Dana, of Connecticut; Jesse Wharton, of Tennessee; Benjamin Howard, of Kentucky; Jeremiah Morrow, of Ohio; Joseph Calhoun, of South Carolina; and John Campbell, of Maryland.

On April 21,[13] Mr. Morrow reported a resolution which, after amendment, was agreed to as follows:

Resolved, That George Poindexter, chairman of the said committee, be authorized to cause to be taken before a magistrate or other proper officer such depositions in relation to the official conduct of the said judge as, in his judgment, may be material to the inquiry, having first notified the said Bruin of the time and place, or places, of taking such depositions, so that he may give his attendance; and that the depositions so taken be laid before the Congress at their next session.

On April 25 this session of Congress adjourned.

It does not appear that the matter was again taken up. On March 7, 1809, as the records of the State Department show, Francis Xavier Martin was appointed judge, indicating the death or resignation of Judge Bruin.

It appears that the judges of the court of Mississippi Territory, like the judges of the territory northwest of the Ohio, held office "during good behavior," such being the provision of the statutes.[14]

2488. The inquiry into the conduct of Judge Harry Toulmin, in 1811.

Instance of proceedings looking to the impeachment of a judge of a Territory.

The inquiry as to Judge Toulmin was set in motion by action of a grand jury forwarded by a Territorial legislature.

In Judge Toulmin's case the House, after investigating in a preliminary way, declined to order a formal investigation.

On December 16, 1811,[15] the Speaker laid before the House a letter from Cowles Mead, speaker of the house of representatives of the Mis-

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[12] Journal, p. 277; Annals, p. 2189.
[13] Journal, p. 286; Annals, p. 2251.
[14] 1 Stat. L., pp. 51, 550.
[15] First session Twelfth Congress, Journal p. 67; Annals, p. 522; American State Papers, Vol. II (Miscellaneous), p. 162; Annals, p. 2162.

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sissippi Territory, inclosing the copy of a presentment against Harry Toulmin, judge of the superior court for the Washington district, in said Territory,[16] made by the grand jury of Baldwin County, specifying charges against the said judge, which were read and ordered to lie on the table.

Mr. George Poindexter, Delegate from Mississippi Territory, also presented a copy of the same presentment; which was ordered to lie on the table.

On December 19[17] Mr. Poindexter submitted this resolution:

Resolved, That a committee be appointed to inquire into the conduct of Harry Toulmin, judge of the district of Washington, in the Mississippi Territory, and report whether, in their opinion, he hath so acted, in his official capacity, as to require the interposition of the constitutional powers of this House; and that said committee have power to send for persons and papers.

On December 21[18] Mr. Poindexter withdrew the resolution, and moved that the letter of Cowles Mead, with the accompanying papers, be referred to a select committee to consider and report thereon to the House.

The committee was appointed as follows: Messrs. Poindexter, John Rhea, of Tennessee, John C. Calhoun, of South Carolina; John Taliaferro, of Virginia; Abijah Bigelow, of Massachusetts, and Epaphroditus Champion, of Connecticut.

On January 14, 1812,[19] sundry documents in refutation of the charges were presented and referred to the committee. Also on February 1[20] other papers of a similar tenor were presented and referred. On March 19 and 25 also, similar papers were referred.

On March 11[21] a motion of Mr. Rhea that the committee be discharged from consideration of the subject was decided in the negative, and on April 13 a motion that the committee be directed to report was likewise decided in the negative.

On May 21[22] Mr. Poindexter, from the committee, reported—

That the charges contained in the presentment aforesaid have not been supported by evidence; and from the best information your committee has been enabled to obtain on the subject it appears that the official conduct of Judge Toulmin has been characterized by a vigilant attention to the duties of his station, and an inflexible zeal for the preservation of the public peace and tranquillity of the country over which his judicial authority extends. They therefore recommend the following resolution:

"*Resolved*, That it is unnecessary to take any further proceeding on the presentment of the grand jury of Baldwin County, in the Mississippi Territory, against Judge Toulmin."

This report was concurred in by the House.

2489. The inquiry into the conduct of Judges William P. Van Ness, Mathias B. Tallmadge, and William Stephens, in 1818.

Judge William Stephens having resigned his office, the House discontinued its inquiry into his conduct.

In 1818 the House inquired into the official conduct of Judges William P. Van Ness and Mathias B. Tallmadge, of the district courts of New York, and William Stephens of the district court of Georgia.[23]

[16] The Mississippi judges were created by statute which made the tenure during good behavior. (1 Stat. L., pp. 51, 550; 2 Stat. L., pp. 301, 564.)
[17] Journal, p. 78; Annals, p. 559.
[18] Journal, p. 87; Annals, p. 567.
[19] Journal, p. 125.
[20] Journal, pp. 155, 255, 265.
[21] Journal, pp. 242, 288.
[22] Journal, p. 347; Annals, p. 1436.
[23] First session Fifteenth Congress, Journal, p. 447; Annals, p. 1715.

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The committee found that Judge Van Ness had shown some remissness in not exercising constant vigilance over the money of the court, which had been purloined by the clerk, and in not vigorously enforcing the provisions of the law and rules of the court. There were also complaints against some decisions and orders of Judge Van Ness, "but the respect which this committee entertains for the constitutional rights of a judge, and for the laws which provide adequate remedies for any errors he may commit, forbids their questioning any judicial opinions." The committee say that they have discovered nothing which furnishes "any ground for the constitutional interposition of the House." [24] The inquiry into the conduct of Judge Van Ness was instituted by a resolution reported from the Judiciary Committee, who had been examining the conduct of the clerk of the court, and found some circumstances connected with the judge's conduct which justified investigation.[25] And the names of Judges Tallmadge and Stephens had been added by way of amendment to the resolution of inquiry.

On November 24, 1818,[26] on motion of Mr. John C. Spencer, of New York, it was

Ordered, That the committee appointed at the last session of Congress, to inquire into the official conduct of certain judges of the courts of the United States, be discharged from so much of their duty as relates to the conduct of William Stephens, who has resigned his office of judge of the court of the United States for the district of Georgia.

On February 17, 1819,[27] Mr. Spencer reported on the case of Judge Tallmadge, who was charged with having omitted to hold the terms of the district court for which he was appointed, according to law. The committee found that at certain times he had omitted sessions, but say:

It appears satisfactorily, from the testimony of several physicians, and of the Hon. Nathan Sanford, given on a former inquiry into the conduct of Judge Tallmadge, that in 1810 his health became extremely delicate, and that very great exertion of body, or any unusual agitation of mind, invariably produced severe sickness, so as to disqualify him for any official duties; and that his life was prolonged by visiting a more genial climate in the winter season.

On entering upon the duties of his office in 1805, Judge Tallmadge encountered a mass of business which had accumulated from the ill health and the death of his predecessor, and from the want of any judge in the court for the time immediately preceding his appointment. The sickness of Judge Patterson, who should have presided in the circuit court, materially increased the labors of the district judge.

The committee are of opinion that there is nothing established in the official conduct of Judge Tallmadge to justify the constitutional interposition of the House.

The report was laid on the table.

2490. The investigation into the conduct of Judge Joseph L. Smith, in 1825 and 1826.

The House decided to investigate the conduct of Judge Smith, on assurance of a Territorial Delegate that the person making the charges was reliable.

Instance wherein charges were presented against a judge in three Congresses.

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[24] Second session Fifteenth Congress, Report No. 136.
[25] Annals, p. 1715.
[26] Second session Fifteenth Congress, Journal, p. 35; Annals, p. 313.
[27] Journal, p. 279; Annals, p. 1222.

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On February 3, 1825,[28] Mr. Richard K. Call, Delegate from Florida Territory, presented this resolution:

Resolved, That the Committee on the Judiciary be instructed to inquire whether either of the judges of the district courts of Florida have received fees for their services not authorized by law; and, if any, what other malpractices have been committed by the said judges, or either of them; and that the said committee be authorized to compel the attendance of persons and the production of papers to promote this investigation.

In support of this resolution Mr. Call presented a letter addressed to himself by Edgar Macon, United States attorney for East Florida, in response to a request made by Mr. Call for information.

At the May term of the superior court of East Florida—

Says Mr. Macon's letter—

In 1824 Judge Smith established a number of rules for the government of the practice of his court, by which provision is made for the transacting and doing of much business in vacation, which previously had been done in term, viz, such as making orders for commissions to take foreign testimony, and hearing and deciding on motions for amending pleadings, etc., and other matters and questions generally aiding in the usual progress of a suit; for all which services, when performed, Judge Smith has charged fees. I have paid them, and I believe every attorney of his (Judge Smith's) court has done the same. It is proper to mention that in the United States and Territorial cases Judge Smith has never charged fees.

Mr. Call vouched for the reliability of Mr. Macon's word, and asked that the resolution be agreed to.

The House, without division, agreed to the resolution.

On February 28,[29] Mr. William Plumer, jr., of New Hampshire, from the Committee on the Judiciary, submitted a report, saying that the committee were—

not able to perceive how any law of the Territory can authorize the judge to receive any compensation in the shape of fees for his official services in the place which he holds under the authority of the United States. The distance of the parties, however, from the seat of government, renders it wholly impracticable to make any investigation into the particular circumstances of the case during the present session of Congress. The committee therefore pray that they may be discharged from any further consideration of the resolution.

The report was read and laid on the table.

At the beginning of the next Congress on December 27, 1825,[30] Mr. Joseph M. White, Delegate from Florida, presented the petition of Joseph L. Smith, judge of the supreme court of said Territory, praying that his conduct as judge might be inquired into, and that his character might be freed from the public inputation to which it had been subjected.

Mr. White also presented the petition of Edgar Macon charging Judge Smith with malfeasance and corruption in office, and praying that the charges might be investigated by Congress.

These papers were ordered referred to the Judiciary Committee.

On January 9[31] Mr. White presented a memorial of the legislative council of Florida soliciting an investigation of the charges preferred against Judge Smith.

This paper also was referred to the Judiciary Committee.

On February 7, 1826,[32] Mr. John C. Wright, of Ohio, from the

[28] Second session, Eighteenth Congress, Journal, pp. 197, 198; Debates, pp. 438, 439.
[29] Journal, p. 279; Report No. 87.
[30] First session, Nineteenth Congress, Journal, p. 93.
[31] Journal, p. 129.
[32] Journal, p. 233.

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Committee on the Judiciary, reported that the committee had examined the petition, memorial, and evidence offered, and asked that they be discharged from the further consideration of the subject.

This report was agreed to by the House.

On January 11, 1830,[33] Mr. White presented a memorial addressed to the President of the United States, and sundry documents signed by the citizens of East Florida, charging Judge Smith with tyrannical and oppressive conduct, and imploring his removal from the office of judge.

These papers were referred to the Judiciary Committee, but it does not appear that they were ever reported on.[34]

2491. The investigations into the conduct of Judge Buckner Thurston, in 1825 and 1837.

The investigations into the conduct of Judge Thurston were set in motion by memorials.

Form of memorial praying for the impeachment of Judge Thurston, in 1837.

The House sometimes refers for preliminary inquiry a memorial praying impeachment and sometimes orders investigation at once.

In 1825 the House preferred that charges against a judge should be investigated by a committee.

During the investigation of Judge Thurston with a view to impeachment he was present and cross-examined witnesses.

On February 21, 1825,[35] Mr. James Strong, of New York, presented a petition of John P. Van Ness complaining of the official conduct of Buckner Thurston, one of the associate judges of the Circuit Court of the United States for the District of Columbia, and praying that the subject of his complaint might be inquired into by Congress.

The petition was referred to the Committee on the District of Columbia, but on February 24 the reference was changed to the Judiciary Committee.

On February 28[36] Mr. William Plumer, jr., of New Hampshire, from the Judiciary Committee, submitted a report that the committee—

> Having investigated the matter of the memorial, they are unanimously of opinion that there is nothing in the conduct of Judge Thurston which requires the interposition or reprehension of this House. They therefore ask to be discharged from the further consideration of this memorial.

The report was laid on the table.

On January 30, 1837,[37] the Speaker presented a memorial of Richard S. Coxe and William L. Brent, of the District of Columbia, praying an investigation into the judicial conduct of Judge Thurston. The memorial in part was as follows:

> Should this memorial be referred to the appropriate committee we pledge ourselves to prove to the satisfaction of Congress—
>
> 1. That Judge Thurston is grossly and avowedly ignorant and regardless of the law which it is his duty to administer.

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[33] First session Twenty-first Congress, Journal, p. 146.

[34] The judge of the supreme court of Florida held his office by virtue of a statute, and for the term of four years. (3 Stat. L., p. 753; 4 Stat. L., p. 45.)

[35] Second session Eighteenth Congress, Journal, pp. 254, 267.

[36] Journal, p. 279; Report, No. 85.

[37] Second session Twenty-fourth Congress, Journal, pp. 316, 317.

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2. That he is habitually inattentive and neglectful in the discharge of his official duties.

3. That his deportment on the bench is rude, insolent, and undignified, and calculated to bring the administration of the law into contempt.

4. That he is habitually rude and insolent toward his brethren on the bench, to their great annoyance and to the hindrance of justice.

5. That he is habitually rude, insolent, and quarrelsome toward the members of the bar; constantly in a state of irritation and excitement, applying to them, without cause or provocation, the most harsh and vulgar epithets in our vocabulary.

6. That, in these different modes, he incessantly interferes with the administration of justice, gratifies his own personal passions at the expense of truth and justice, involves the Government and the community in enormous expenses and vexatious delays, and employs his official power and station in outraging the feeling and illegally and unjustly injuring those who may accidentally become the objects of his infuriate resentment.

7. That on several occasions he has, from the bench, actually invited members of the bar to leave the court and enter into a personal encounter with him.

8. That he is, from want of professional information, from his neglect of his duties, from his furious and ungovernable temper, wholly unfit for the station he occupies.

These general heads of accusations, with all the necessary details of time, place, person, and circumstance, we tender ourselves ready and prepared to establish by the most plenary proof.[38]

On January 31[39] Mr. Francis Thomas, of Maryland, proposed this resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be authorized to send for persons and papers, and to inquire into the truth of the charges made in the memorial of William L. Brent and Richard S. Coxe, complaining of the official conduct of Buckner Thruston, one of the judges of the circuit court of the United States for the District of Columbia.

On March 3,[40] the last day of the Congress, Mr. Thomas reported from the committee, without recommendation of any kind, the testimony taken before the committee. The report was ordered to lie on the table and be printed.

The report shows that many witnesses were examined, and that Judge Thurston was permitted to cross-examine.

Judge W. Cranch, an associate of Judge Thurston, having been called upon to testify in this case, objected on behalf of himself and Judge Morsell to giving testimony, on account of their official relations to the respondent, but the committee overruled this objection.

It does not appear that any action was taken further than the printing of the report.

The records of the State Department indicate that Judge Thurston remained in office until he died, on August 30, 1845. On October 3, 1845, James Dunlop was appointed judge.

2492. The investigation into the conduct of Judge Alfred Conkling in 1829.

In the case of Judge Conkling the memorial preferring charges was referred to the Judiciary Committee for examination before an investigation was ordered.

Views of the minority of the Judiciary Committee, in 1830, as to offenses amounting to high misdemeanor.

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[38] The memorialists subscribed their names to the memorial, but the signatures were not attested.

[39] Journal, p. 332.

[40] Journal, p. 586; Report No. 327.

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On February 16, 1829,[41] Mr. Selah R. Hobbie, of New York, presented a memorial of Martha Bradstreet, of the State of New York, preferring charges against Alfred Conkling, judge of the district court of the United States for the northern district of New York, as grounds for an impeachment of the said judge.

This memorial was referred to the Committee on the Judiciary.

On February 23 the House ordered the committee discharged from consideration of the memorial and gave the memorialist leave to withdraw.

In the next Congress, on February 22, 1830,[42] on motion of Mr. Churchill C. Cambreleng, of New York, it was ordered that the memorial of Martha Bradstreet in relation to Judge Conkling be referred to the Committee on the Judiciary.

On March 22[43] Mr. Cambreleng presented a memorial of Martha Bradstreet, preferring additional charges and praying to be permitted to substantiate them. This memorial was referred to the Judiciary Committee.

On March 26[44] the Judiciary Committee were granted leave to sit during sessions of the House for the purpose of investigating the matters set forth in the memorial.

On April 3[45] Mr. Charles A. Wickliffe, of Kentucky, from the Committee on the Judiicary made an unfavorable report on the memorial, finding no cause for impeachment. This report was concurred in by all the members of the committee except Mr. Warren R. Davis, of South Carolina. Presumably those concurring were Messrs. James Buchanan, of Pennsylvania; Henry R. Storrs, of New York; Thomas T. Bouldin, of Virginia; William W. Ellsworth, of Connecticut; and Edward D. White, of Louisiana. Mr. Davis dissented, and on April 8[46] filed minority views. He states in his views that the memorialist presented thirty-three charges for misdemeanors in office. The majority had concluded that there was nothing in the charges or in the testimony adduced to support them that required the constitutional interposition of the House. The minority believed that two charges were supported by adequate testimony, and if true amounted to a high misdemeanor:

(*a*) His causing the name of John L. Tillinghast to be struck from the rolls of the said court, for having expressed out of court his opinion of the said Judge Conkling.

(*b*) His having thereby illegally and unconstitutionally assumed to himself the power to act as judge in his own cause. And, in pursuit of his object, violated the immemorial course and practice of courts of justice, and disregarded even the form of law. And this for the mere gratification of his private revenge.

Mr. Davis argued at some length in support of his claim that the two specifications, as supported by the evidence, contained matter amounting to misdemeanor in office.

The report of the majority was laid on the table, and no further action appears.

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[41] Second session Twentieth Congress, Journal, pp. 291, 292, 324.
[42] First session Twenty-first Congress, Journal, 319.
[43] Journal, p. 447.
[44] Journal, p. 462.
[45] Journal, p. 494.
[46] Journal, p. 514; Report No. 342.

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2493. The investigation of the conduct of Benjamin Johnson, a judge of the superior court of the Territory of Arkansas, in 1833.

In 1833 the Judiciary Committee held that a Territorial judge was not a civil officer of the United States within the meaning of the Constitution.

On January 15, 1833,[47] the Speaker submitted to the House a letter from Egbert Harris, of the Territory of Arkansas, inclosing charges and specifications made by William Cummins against Benjamin Johnson, one of the judges of the superior court of the Territory of Arkansas.

Mr. Ambrose H. Sevier, Delegate from Arkansas, presented sundry documents exculpatory of Judge Johnson.

The letter of Mr. Harris and the other papers were referred to the Committee on the Judiciary.

On February 8 [48] Mr. John Bell, of Tennessee, presented the report of the committee on the memorial. The committee included besides Mr. Bell, Messrs. William W. Ellsworth of Connecticut; Henry Daniel, of Kentucky; Thomas F. Foster of Georgia; Wm. F. Gordon, of Virginia; Samuel Beardsley, of New York, and Richard Coulter, of Pennsylvania.

The report first dealt with a preliminary question:

A majority of the committee are strongly inclined to the opinion that such an officer is not a proper subject of trial by impeachment. Some of the reasons upon which that opinion may be supported will be stated.

The Constitution, in Article II, section 4, provides that "all civil officers of the United States shall be removed from office by impeachment." The institution by Congress of those political corporations, denominated, in the language of our legislation upon that subject, Territorial governments, is only authorized by a very liberal construction of the general power given by the Constitution to Congress over the public domain. But, admitting that exercise of power to be well enough founded, still, can a judge of such a government be said to be an officer of the United States within the meaning of the clause already quoted? Should the doubt thrown out by the committee upon this point appear to the House to be without reasonable foundation, they think they will be fully sustained in the opinion, that, whether liable to impeachment or not the practice of impeaching subordinate officers, and especially such as hold their offices by a tenure not more firm and durable than the judge of a Territorial court would soon be found highly inconvenient and injurious to the public interest. The judge whose conduct in the present instance is alleged to be such as to call for the exercise of the impeaching power of the House, holds his office for a term of four years only, and may, by the express provision of the act of Congress establishing his office, be removed at any time within that term by the President. The trial by impeachment is the highest and most solemn in its nature known in the administration of public justice. It is established for high political purposes, and would seem to be proper only against judges who hold their offices during good behavior, and other high officers of the Government, for such crimes or misdemeanors as the public service and interest require to be punished by removal from office.

Proceeding to the merits of the case, the report says:

The general charges against him are favoritism or partiality to particular counsel in the trial of causes, irritability of temper and rudeness on the bench toward his brother judges and the bar; incapacity, manifested by a vacillating and inconsistent course of judicial decision, and habitual intemperance.

The committee did not find these charges well sustained, and furthermore they found decided and unequivocal testimony in favor of the judge.

[47] Second session Twenty-second Congress, Journal, p. 179.
[48] Journal, p. 290; Report No. 88.

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The report was laid on the table.

2494. The investigation into the conduct of Judge P. K. Lawrence, in 1839.

The proceedings in the case of Judge Lawrence were set in motion by a memorial setting forth specific charges.

The memorial setting forth charges against Judge Lawrence was referred for examination before an investigation was ordered.

The House referred the charges made against Judge Lawrence, in 1839, to a select committee instead of to the Judiciary Committee.

A select committee recommended the impeachment of Judge P. K. Lawrence, in 1839.

The investigation into the conduct of Judge P. K. Lawrence, in 1839, was entirely ex parte.

On January 7, 1839,[49] Mr. Henry Johnson, of Louisiana, presented a memorial of Duncan N. Hennen, a citizen of the State of Louisiana, making charges of high crimes and misdemeanors agains P. K. Lawrence, judge of the district court of the United States for the eastern district of Louisiana, and praying that the House of Representatives would inquire into the facts whether the said Judge Lawrence, in the exercise of the high trust and confidence reposed in him, had not been guilty of corrupt, malicious, and dangerous abuses of power.

The memorial set forth specifically that the memorialist had been appointed clerk of the said court in 1834, and had served until May 18, 1838, when Judge Lawrence sent him a letter of removal and informing him that John Winthrop had been appointed in his place; that the memorialist, being advised that Judge Lawrence had acted without power, refused to deliver the records of the court to the said Winthrop; that Judge Lawrence had issued a writ without authentication of the seal of the court, commanding the marshal to seize the records; that the memorialist, as clerk of the district court, became ex officio clerk of the circuit court for the ninth circuit; that on May 21, 1838, both the memorialist and the said Winthrop presented themselves, each as clerk, before the circuit court, Judge John McKinley and the aforesaid Judge Lawrence, sitting; that the memorialist objected, when arguments were to be heard on the rival claims, to Judge Lawrence sitting in the matter, (*a*) because he professed to have formed and delivered an opinion on the question; (*b*) because, from expressions in the letter of removal, he had confessed partiality toward the said Winthrop; (*c*) because there was no need of the said Judge Lawrence passing on the case since memorialist was willing to acquiesce if Judge McKinley held the removal legal; (*d*) and because a difference of opinion between the judges would lead to adjournment of court until a final decision by the Supreme Court of the United States; that Judge Lawrence persisted in sitting, and there resulted a difference of opinion between him and his associates; that Judge McKinley held that the removal was illegal and that the memorialist was de jure and de facto clerk, to which Judge Lawrence dissented; that the circuit court adjourned without transaction of business; that the memorialist continued in possession of the seals and records of both courts, and that the records of the district court

[49] Third session Twenty-fifth Congress, Journal p. 222; Globe, p. 404; Report, No. 272.

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were not seized by the marshal under the writ until the next June; that in November 19, 1838, at the holding of the circuit court, in the absence of Judge McKinley, Judge Lawrence declined to allow the memorialist's deputy to perform the duties of clerk, but made a rule in a civil cause calling upon the deputy to produce the records, and on the succeeding day committed the deputy to prison for alleged contempt; that after release by habeas corpus the deputy was a second time committed for refusing to deliver the records; that the said proceedings were in violation of the act of April 29, 1802, providing "that imprisonment is not allowed, nor punishment in any case inflicted, where the judges of the said court are divided in opinion upon the question touching such imprisonment;" that the said proceedings of Judge Lawrence to take the records were made after the Supreme Court of the United States had granted a rule requiring Judge Lawrence to show cause why the memorialist should not be allowed to discharge the duties of the office; that Judge Lawrence had caused a new seal, not in form required by law, to be made; that Judge Lawrence, on November 26, 1838, had issued a writ authorizing the seizure of the records of the circuit court wheresoever found, thus illegally authorizing a seizure out of his district; that Judge Lawrence had refused to obey a mandate of the Supreme Court in a certain case, giving out that the Supreme Court had grossly mistaken the law; that he had illegally absented himself from his district; that he had for five years been notoriously and inveterately addicted to the intemperate use of ardent spirits, and that by his course in regard to the clerkship he had suspended the administration of justice for a judicial year.

This memorial was signed by the memorialist, but the signature was not attested.

Mr. Johnson asked that the memorial be referred to a select committee. Although it was suggested that the Judiciary Committee should consider it, Mr. Johnson's motion was agreed to, and the committee was composed of Mr. Johnson and Messrs. John Pope, of Kentucky; Thomas T. Whittlesey, of Connecticut; John Campbell, of South Carolina; George W. Owens, of Georgia; William B. Calhoun, of Massachusetts; and George C. Dromgoole, of Virginia.

On January 21,[50] on motion of Mr. Johnson, it was:

> *Resolved*, That the select committee appointed to inquire into the charges of high crimes and misdemeanors against P. K. Lawrence, judge of the district court of the United States for the State of Louisiana, be authorized to send for persons and papers.

On February 11,[51] Mr. Johnson submitted the report of the committee. This report consisted largely of affidavits and records of testimony taken in Louisiana. It is all ex parte. The report concludes:

> That, in consequence of the evidence * * * they are of the opinion that Philip K. Lawrence, judge of the district court of the United States for the eastern and western districts of Louisiana, be impeached for high misdemeanors in office.

It was ordered that the report be considered on February 21, but the Congress was nearing its close and no action by the House appears.

[50] Journal, p. 332.
[51] Journal, p. 521; Report, No. 272.

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On September 3, 1841, as the records of the State Department show, Theodore H. McCaleb was appointed judge of this district.

2495. The investigations into the conduct of John C. Watrous, United States Judge for the district of Texas.

The House, in 1852, on the strength of a memorial setting forth charges, investigated the conduct of Judge Watrous with a result favorable to him.

In the investigation of 1852 Judge Watrous, the accused, was permitted to appear before the committee with counsel. (Footnote.)

The conduct of Judge Watrous was the subject of reports, favorable and unfavorable, in four Congresses.

On February 13, 1852,[52] Mr. Abraham W. Venable, of North Carolina, from the committee on the Judiciary reported a resolution as follows:

Resolved, That the Committee on the judiciary be authorized to send for persons and papers, with authority to examine witnesses,[53] under oath, in relation to the charges made against John C. Watrous, judge of the United States for the district of Texas.

Mr. Venable explained that a memorial of William Alexander, a lawyer of Texas, had been presented to the House, charging Judge Watrous with practicing law and receiving fees in the State of Texas touching matters which had come before and been decided upon by himself, with adjudicating cases in which he was personally interested, and with certain violations of the laws of Texas militating against his judicial purity.

The resolution was agreed to by the House.

On August 27[54] the Speaker laid before the House a letter from Judge Watrous, wherein he stated that the pending inquiry was preventing the decision of important cases in his court, and asked for speedy action by the House. This communication was referred to the Committee on the Judiciary, and then, on motion of Mr. Richardson Scurry, of Texas, it was

Ordered, That the Committee on the Judiciary have leave to report upon the case of the said Judge John C. Watrous at any time.

At the next session of Congress, on January 13, 1853,[55] Mr. William A. Howard, of Michigan, presented additional evidence in the case, which was referred to the Judiciary Committee.

On February 28,[56] Mr. Venable submitted the report of the committee, which was as follows:

That after an examination of much documentary evidence, as well as many witnesses, summoned from Texas, they do not recommend that articles of impeachment be directed by this House against the said John C. Watrous.

This report was laid on the table.

2496. The Watrous investigation continued.

In the investigation of 1856 the Judiciary Committee made a report favoring impeachment on the strength of memorials and without the power to compel testimony being given by the House.

[52] First session Thirty-second Congress, Journal, p. 348; Globe, p. 560.

[53] In his answer filed with the Judiciary Committee in 1858 (first session Thirty-fifth Congress, House Report No. 540, p. 18) Judge Watrous makes a statement which shows that during these proceedings in 1852 he was present with counsel before the committee. It also appears that witnesses were examined at that time (p. 437 of Report No. 540).

[54] Journal, p. 1087; Globe, p. 2382.

[55] Second session Thirty-second Congress, Journal, p. 125.

[56] Journal, p. 350; Globe, p. 927; Report No. 7.

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The memorials submitting the charges against Judge Watrous, in 1856, were accompanied by a large amount of documentary evidence.

The investigation of the conduct of Judge Watrous, in 1856, was conducted entirely ex parte, but the evidence was documentary and voluminous.

In the Watrous investigation of 1856 the Judiciary Committee, following precedents, reported the evidence but made no specific charges.

The Watrous report of 1856 led to a debate as to the propriety of ex parte investigations and to a citation of English and American precedents.

It appears that a report impeaching a civil officer was not considered, in 1856, privileged to be made at any time. (Footnote.)

On July 30, 1856,[57] Mr. Miles Taylor, of Louisiana, presented the memorial of Jacob Mussina, a citizen of Louisiana, praying for an investigation into the conduct of Judge Watrous; and on August 6, Mr. Peter H. Bell, of Texas, presented a memorial of Eliphas Spencer, of Texas, asking for the impeachment of Judge Watrous. These papers were referred to the Judiciary Committee.

The memorial of Jacob Mussina, who was a party to a chancery suit litigated in Judge Watrous's court in Galveston, set forth in detail charges of conduct oppressive and partial and in entire disregard of the well-established rules of law and evidence and the rights of litigants. The memorial of Eliphas Spencer, who was interested in a tract of land in Texas, charged Judge Watrous with entering into a conspiracy for the purpose of fraudulently and corruptly adjudicating and determining the validity of a certain grant, by means of which the said judge himself secured the title of a portion of the land, or the proceeds of the sale of it.

The two memorials were accompanied by a mass of records and documents, among which was a joint resolution of the legislature of Texas, approved March 20, 1848, charging Judge Watrous with improper conduct, and suggesting corrupt acts, and requesting him to resign his office.

It is not wholly certain from the report of the Judiciary Committee whether or not they sought evidence beyond the documents furnished with the memorials. If they did, it was purely documentary. It does not appear that they asked the House for authority to take testimony, and they did not take any, unless documentary.

On February 2, 1857,[58] Mr. Lucian Barbour, of Indiana, asked a suspension of the rules to enable him to report from the Committee on the Judiciary,[59] and on February 9, by a vote of yeas 156, nays 32, the rules were suspended and the report was made, accompanied by this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

In their report, which was unanimous with the exception of one dissenting member, two members being absent, the committee say:

[57] Second session Thirty-fourth Congress, Journal, pp. 1326, 1376; Globe, p. 1818.
[58] Third session Thirty-fourth Congress, Journal pp. 347, 381, 507; Globe, pp. 542, 627–630, 797, 798; Report No. 175.
[59] At that time such a report does not seem to have been held privileged.

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Upon referring to the proceedings in cases of former impeachments, the committee find that specific charges of impeachment have not been preferred in the report of the committee to the House; but in most cases they have simply reported the testimony, with a resolution that the accused be impeached of high crimes and misdemeanors. Specific charges have been preferred afterwards, when the Senate has signified its readiness to proceed with the trial. The committee would, however, state very briefly the substance of the charges in the petitions and the grounds upon which they have resolved to report the resolution.

After reviewing the charges, the report concludes:

The committee have examined numerous records, consisting of pleadings, orders of court, affidavits, and depositions, and after a patient and laborious research they have reluctantly come to the conclusion that the conduct of Judge Watrous in the cases above referred to can not be explained without supposing that he was actuated by other than upright and just motives; that in his disregard of the well-established rules of law and evidence he has put in jeopardy and sacrificed the rights of litigants, and in acquiring a title to property in litigation, or held by adverse possession, he has given just cause of alarm to the citizens of Texas for the safety of private rights and property, and of their public domain, and has debarred them from the rights of an impartial trial in the Federal courts of their own district.

The report having been read, two questions at once arose. Mr. Howell Cobb, of Georgia, asked if the testimony had been printed and declared that he should be unwilling to act on the resolution presented by the committee until he had been enabled to read the testimony.

Mr. Humphrey Marshall, of Kentucky, desired, as a member of the Judiciary Committee, to state that he had had nothing to do with the proceedings resulting in the report, since he had come to the conclusion that the investigation ought not to proceed without notice to the party. Mr. John A. Quitman, of Mississippi, said he was unwilling to assist in bringing on the expense and trouble of an impeachment trial without the strongest probable cause, and he was not willing to take as probable cause the strongest ex parte testimony where the opposite party had not been heard. Mr. John S. Caskie, of Virginia, cited the precedents in the cases of Judge Peck and Warren Hastings, and while not claiming that it was absolutely incumbent for a committee charged with the consideration of a memorial praying an impeachment to give notice to the person against whom the charges were made and allow him to cross-examine witnesses before them, yet such was evidently the fair and judicious course.

Mr. George A. Simmons, of New York, speaking for the committee, said:

I am perfectly aware that in many such cases, in perhaps the majority of cases of impeachment, the party accused has been before the committee just as both parties are sometimes examined before magistrates. But there have been one or two cases in the House where the party accused has not been before the committee. It seems to me to be the opinion of the House—and probably well-founded on the Constitution—that a judge can not be displaced incidentally by remodeling his jurisdiction, or anything of that sort, although it was once done by Mr. Jefferson on a very large scale, to the satisfaction of the Democratic party. Notwithstanding that, the committee have come to the conclusion that it is the sense of the House, as it is undoubtedly the opinion of commentators, such as Judge Story, that there is no way to get rid of a judge, however unpopular he may be, however destitute he may be of the confidence of the people, unless by impeachment. The committee think that an impeachment ought to lie in all cases where there is a want of good behavior. It is not necessary to prove him guilty of high treason, or of highway robbery, or of some indelicate crime. It is enough that he has not fulfilled his duty as a judge in all respects so as to entitle himself to the confidence of the people. * * * It does not always follow that a man must be present when he is indicted by a grand jury. Neither

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does it always follow that because he is indicted he must be convicted. There undoubtedly should be prima facie evidence sufficient before the grand jury to satisfy them that the man whom they indict is guilty of the crime, just as there should be sufficient prima facie evidence in cases of impeachment—which are analogous—to show that the judge has failed in good official behavior.

Mr. Abram Wakeman, of New York, said:

The evidence is almost entirely of a documentary character, and if there is no other reason that alone would absolve the committee from the necessity of calling Judge Watrous before them. They are also of opinion that it was not within their province or their duty, in reference to the charge placed in their hands, to compel or require the attendance of Judge Watrous at this stage of the proceeding. They were called upon to inquire whether there was a prima facie case of corruption against him. If there was, they considered it their duty to present him before the Senate of the United States, where his case could be properly heard and tried. If * * * we were under an obligation to investigate and pronounce a decision upon this case, Judge Watrous would have two trials—first, before the Committee on the Judiciary, where he would be under the necessity of calling witnesses and counter witnesses, and the committee would stand in the capacity of judges, in the first instance, to try the guilt of innocence of Judge Watrous. * * * In one case of impeachment alone, where a judge was charged with high crimes or misdemeanors, was he summoned before the committee prior to the presentation of his case to the House.

Mr. Wakeman later stated this case specifically—that of Judge Pickering.

The House, without division, decided that the testimony should be printed, and that the consideration of the resolution should be postponed to Saturday, February 21.

On that day it was announced that a delay had occurred at the printing office and the testimony had not yet been printed. Mr. Caskie urged that the matter should be allowed to go over to the next Congress. A few days only remained of this Congress, and if they should agree to the resolution of impeachment new men would have to carry on the trial, as very few of this House were elected to the next, and not a single member of the Judiciary Committee had been returned.

Mr. Barbour, however, moved that the matter be postponed to Saturday, February 28, and this motion was agreed to.

But on February 28 only three legislative days remained to the Congress, and the resolution was not considered.

2497. The Watrous investigation continued.

In 1857 memorials before the House in a preceding Congress were reintroduced as a basis for investigation of the conduct of Judge Watrous.

The Watrous investigation of 1857 was limited in its scope by the withdrawal from the Judiciary Committee of a memorial containing certain charges.

In the Watrous investigation of 1857, the committee being equally divided, reported the evidence and two propositions, each supported by minority views.

In the investigation of 1857 the committee formally permitted Judge Watrous to file a written explanation and cross-examine witnesses in person or by counsel.

The committee investigating Judge Watrous, in 1857, appears to have informally permitted the accused to adduce testimony.

Discussion of the proper mode of examination in an investigation with a view to impeachment.

In the Watrous investigation of 1857 the written explanation of the accused was printed as part of the report.

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An argument that judges may be impeached for any breach of good behavior.

After the report on his conduct by a committee, Judge Watrous presented to the House a memorial embodying his defense, and it was ordered printed and laid on the table.

At the beginning of the next Congress, on December 17, 1857,[60] Mr. Guy M. Bryan, of Texas, presented the memorial of Eliphas Spencer, praying for the impeachment of Judge Watrous; and on the next day[61] Mr. Miles Taylor, of Louisiana, reintroduced the memorial of Jacob Mussina, which had been presented in the preceding Congress.

On January 15, 1858,[62] Mr. George S. Houston, of Alabama, from the Committee on the Judiciary, presented this resolution, which was agreed to:

Resolved, **That the Committee on the Judiciary be authorized to send for persons and papers and examine witnesses on oath in relation to the charges made against John C. Watrous, judge of the United States court for the western district of the State of Texas.**

On February 18[63] Mr. Bryan presented resolutions of the legislature of Texas, which were referred to the Judiciary Committee; and on February 23[64] Mr. John H. Reagan, of Texas, presented the memorial of William Alexander on the same subject, and it was referred to the same committee.

On May 15[65] Mr. Horace F. Clark, of New York, from the Committee on the Judiciary, moved that that committee be discharged from the further consideration of the memorial of William Alexander. He said that in investigating the charges made in the memorials of Jacob Mussina and Eliphas Spencer the committee had taken up the matter de novo, as they were not satisfied with the methods of the committee in the preceding Congress. But they found that the allegations in the memorial of Alexander had been investigated by the committee in the Thirty-second Congress, and the committee had reported against impeachment proceedings. Therefore, with the great amount of labor involved in hearing the other charges, the committee did not wish to pursue the Alexander charges. It was urged also that the committee in the preceding Congress had taken no notice of the Alexander charges. Mr. John H. Reagan urged that the Alexander charges should be investigated, especially in the view that articles of impeachment might be prepared.

The House, on May 17, agreed to the motion of Mr. Clark that the committee be discharged.

On June[66] Mr. Houston presented the report of the committee, which was simply to the effect that they were equally divided, one portion recommending a resolution that Judge Watrous be impeached and the other portion a resolution that the testimony did not afford sufficient grounds for impeachment.

On June 7[67] both portions of the committee, by permission of the

[60] First session Thirty-fifth Congress, Journal, p. 81.
[61] Journal, p. 85.
[62] Journal, p. 175; Globe, p. 304.
[63] Journal, p. 404; Globe, p. 782.
[64] Journal, p. 412.
[65] Journal, pp. 826, 835, 836; Globe, pp. 2167–2169, 2195.
[66] Journal, p. 1004; Globe, p. 2659; House Report No. 540.
[67] Journal, p. 1045; Globe, p. 2774; House Report No. 548.

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House, presented minority views, which gave the respective opinions of the two portions.

The regular report, although giving no opinions, was accompanied by the record of the evidence and also by record of certain proceedings. It appears that on January 8 [68] Mr. Houston, chairman of the committee, addressed a letter to Judge Watrous informing him of the reference of the memorials, and notifying him that the subject-matter would be taken up on February 2, next. To this Judge Watrous replied:

I most respectfully ask to be informed whether, at the approaching investigation by the committee, * * * I may be permitted to be present, together with my counsel. And I also desire to be informed whether the investigation will be confined to the testimony against me, or will be extended to all sources of information which are necessary to a proper understanding of the case. * * * Should a full and fair investigation of both sides of the case be determined on, I should take great pleasure (if permitted to do so) in furnishing a list of witnesses, whose testimony will put the whole case before the committee.

To this the committee replied by this resolution:

Resolved, That Hon. John C. Watrous be informed that the Committee on the Judiciary will, on Tuesday, the 2d day of February, 1858, take up for investigation and action the memorials of Jacob Mussina and Eliphas Spencer, and that the committee will receive from the said John C. Watrous at any time previous to the said 2d day of February any explanation in writing relative to the charges contained in said memorials, and that after having made such communication in answer to said charges, the said John C. Watrous will be permitted by himself or counsel to cross-examine witnesses who may be examined before said committee.

Mr. Horace F. Clark, of New York, one of the four members of the committee who found against impeachment, while concurring with his three associates on the question of fact, filed supplemental views, in which he said: [69]

I am not satisfied to vote an impeachment upon the ascertainment of what is commonly termed probable causes; nor do I regard the principles of common law relative to proceedings before grand juries applicable to cases of impeachment under the Constitution of the United States. The House of Representatives ought, in my judgment, to look beyond a prima facie case, and failing to discover in the evidence disclosed any fact inconsistent with judicial integrity on the part of Judge Watrous, and finding satisfactory explanations of the circumstances from which suspicions of such integrity may have arisen, should decline subjecting the accused to the expense and hazard of an impeachment.

Although the committee did not give in express terms permission for Judge Watrous to call witnesses on his own behalf, yet he did so. One witness, Robert Hughes, was called and examined in chief by Judge Watrous, and afterwards cross-examined by the committee.[70] And also Robert Hughes, apparently the same person, was on March 2 [71] given leave by the committee to appear as counsel for Judge Watrous. With him as counsel was associated Mr. Caleb Cushing.[72]

In the course of a later debate, Mr. Mason W. Tappan, of New Hampshire, a member of the committee, said: [73]

Testimony was taken on both sides. A long and tedious examination was had. Judge Watrous was permitted to come in and defend his cause and to produce witnesses.

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[68] Report No. 540, p. 14.
[69] House Report No. 548, p. 80.
[70] Report No. 540, pp. 38–76.
[71] Page 77 of Report.
[72] Pages 185, 230 of Report.
[73] Globe, second session Thirty-fifth Congress, p. 17.

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And Mr. Horace F. Clark, of New York, another member of the committee, said further: [74]

The committee determined that it was their province * * * to look into the facts of the case beyond the point necessary to ascertain whether there did or did not exist that technical probable cause which, under the well-settled principles of the common law, justifies a magistrate in holding a person for trial, or may, perhaps, justify a grand jury in finding a bill of indictment. * * * The committee applied, in its broadest sense, that generous maxim, audi alteram partem. * * * They determined to break down all the barriers which, it is admitted by professional men, the rigid rules of the common law sometimes throw in the way of the search after truth.

Judge Watrous's explanation, which treated only questions of fact, was printed as part of the report.

The minority views signed by the four members favoring impeachment, Messrs. Henry Chapman, of Pennsylvania; Charles Billinghurst, of Wisconsin; Miles Taylor, of Louisiana, and George S. Houston, of Alabama, found from the evidence [75]—

That while holding the office of district judge of the United States he engaged with other persons in speculating in immense tracts of land situated within his judicial district, the titles to which he knew were in dispute, and where litigation was inevitable.

That he allowed his court to be used as an agent to aid himself and partners in speculation in land and to secure an advantage over other persons with whom litigation was apprehended. That he sat as judge on the trial of cases where he was personally interested in questions involved, to which may be added a participation in the improper procurement of testimony to advance his own and partner's interests.

Also they concluded as to another charge urged against him:

Every irregular and wrongful decision of the judge [in the Cavazos case dealt with in the Mussina memorial] was in favor of the complainants and against the defendant, Mussina, and those occupying a similar position, and was to their particular injury. By maintaining the proceeding as one rightfully brought on the chancery side of the court, these defendants were illegally deprived of their right to a trial by jury, and were compelled to submit to an adjudication upon their rights to the property in such a manner that the decision would be final and conclusive as to the title of the property, instead of one upon the right of possession, which would at once have been pronounced, on the law side of the court, in an action of ejectment. By maintaining jurisdiction over the case, when a portion of the defendants as well as plaintiffs were aliens, these defendants were deprived of their rights to have the questions involved in it decided by the courts of Texas, to whose jurisdiction they were rightfully amenable, and whose laws were to govern in that decision. By admitting incompetent witnesses to testify, their rights were affected by evidence given by persons who had an interest in the litigation adverse to theirs. And, finally, they are prevented from having the decision against them reviewed in the appellate court by the failure of the judge to perform his full duty to them in facilitating the exercise of the right of appeal given to them by law, from motives of public policy, for their own private advantage, and that, too, when there is some reason to believe that the decree by the court is not in conformity with the principles of law as recognized in Texas. Such a course of action continued through the whole progress of a cause, in favor of some of the parties and against others, is, to our minds conclusive evidence of the existence of a purpose on the part of the judge to favor one party or set of parties at the expense and to the injury of others, which is inconsistent with an upright, honest, and impartial discharge of the judicial functions. And this, we believe, constitutes a breach of the "good behavior" upon which, by the Constitution, the tenure of the judicial office is made to depend.

The Constitution of the United States declares that "the judges, both of the Supreme and inferior courts shall hold their offices during good behavior." Does not this necessarily imply that their offices are to determine, and they are to be removed when they are guilty of a breach of "good behavior?" Clearly so. But

[74] Globe, p. 39.
[75] Report No. 548, pp. 14, 23, 24.

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how are they to be removed? No power of removal is vested in the Executive, nor is there any provision in the Constitution of the United States like that to be found in many if not all the State constitutions, by which the Executive is authorized to remove on the address of two-thirds of the members of the two houses of the legislature. The only mode of removal of judges known to the Constitution is by impeachment, and it therefore necessarily follows that whenever a judge has, in the course of his official conduct, been guilty of actions which are inconsistent with an impartial discharge of the high duties intrusted to him, then it is both the right and duty of this House to proceed in the only way known to the Constitution to effect the removal of the magistrate who misuses or abuses the trust reposed in him for the public good.

The other minority views, concurred in by Messrs. Charles Ready, of Tennessee; Mason W. Tappan, of New Hampshire; Burton Craige, of North Carolina, and Horace F. Clark, of New York, concluded from an examination of the testimony that many of the charges were "utterly frivolous," that some of them were not proven or attempted to be proven, and "that none of them establish, import, or imply, upon the evidence, the commission of any act of malfeasance in office, nor any high crime or misdemeanor." The four members saw nothing in the case but the "resentfulness of two disappointed litigants."

One minority had recommended this resolution:

Resolved, That John C. Watrous, United States district judge for the district of Texas, be impeached of high crimes and misdemeanors.

The other minority recommended:

Resolved, That the testimony taken before the Committee on the Judiciary in the case of the Hon. John C. Watrous, judge of the district court of the United States for the eastern district of Texas, is insufficient to justify the preferment of articles of impeachment against him for high crimes and misdemeanors in office.

On June 10,[76] at the suggestion of the Judiciary Committee, the House postponed further consideration of the subject to the next session of Congress.

At the same time a memorial from Judge Watrous, which had already been placed on the desks of Members and appears to have embodied a defense of his conduct, was ordered to be laid on the table and printed.

2498. The Watrous investigation continued.

In the Watrous case the House discussed whether or not ascertainment of probable cause justified proceeding in impeachment.

As to what are impeachable offenses was a subject of argument in the Watrous case.

After the investigation of 1857 the House decided that the evidence did not justify the impeachment of Judge Watrous.

At the next session the subject was debated at length from December 9 to 15.[77] The principal portion of the debate was on the strength of the evidence to sustain the facts alleged; but two other questions were touched on at some length:

1. Whether the ascertainment of probable cause was sufficient ground for the House to proceed in an impeachment.

Messrs. Chapman and Houston argued [78] at some length in opposition to the views advanced by Mr. Clark. Mr. Clark [79] had argued that

[76] Journal, pp. 1075, 1076; Globe, pp. 2908–2910.
[77] Second session Thirty-fifth Congress, Journal, pp. 56, 69; Globe, pp. 12, 21, 31, 56, 78, 95–102.
[78] Globe, pp. 16, 99.
[79] Mr. Clark's view was upheld by Mr. James A. Stewart, of Maryland, Globe, p. 38.

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the case could not be sent to the Senate on proof short of what would be sufficient to convict. Mr. Houston combated that view, referring to the argument of Mr. Wirt in the Peck trial as conclusive on the point that the action of the House was similar to that of a grand jury; that while the investigation of the House was not necesarily ex parte, the office of the House was not to ascertain whether the party was guilty or innocent of the charges preferred against him, but whether the proof was sufficient to make the case worthy of a further trial. Mr. Chapman called attention to the fact that the trial of the case belonged to the Senate under the Constitution and to the Senate alone. If the House advanced one step beyond the ascertainment of probable cause it was plunged into the trial. The House, in the exercise of its discretion, might examine witnesses on both sides, but there must be a boundary line marking the powers of the House and Senate, and there was no line to be observed, except the ascertainment of probable cause. "Such I understand to have been the views," he said, "entertained in the case of Judge Peck and the case of Judge Chase, of Macclesfield in 1705, in the case of Warren Hastings in 1778, and of Lord Melville in 1805. Probable cause in such a state of facts and circumstances as would induce a cautious man to believe that the party charged is guilty of the offense.[80]

2. As to what are impeachable offenses.

The point was argued at considerable length. In his memorial to the House Judge Watrous had made the point that impeachable acts were only such as were punishable by the ordinary laws of the land. This view was sustained in argument by Messrs. James A. Stewart, of Maryland,[81] Clark B. Cochrane, of New York,[82] and Alexander H. Stephens, of Georgia.[83]

On the other hand, Messrs. John Cochrane, of New York, Miles Taylor of Louisiana,[84] Clement L. Vallandigham, of Ohio,[85] and John A. Bingham, of Ohio,[86] argued that the power of impeachment was broader, and went to an ascertainment of whether or not he had offended against the dignity of the people of the United States, transgressed the grave obligations of his office, or soiled the purity of the ermine. Mr. Bingham discussed especially the precedent of the Peck trial in this particular.

On December 15 [87] a motion was made to strike out all after the word "resolved" in the resolution for impeachment, and insert the text of the second minority resolution, declaring the testimony insufficient to justify impeachment. This amendment was agreed to, yeas 111, nays 91. Then the resolution as amended was agreed to, yeas 112, nays 87.

So the House decided that the evidence did not justify impeachment proceedings.

2499. The Watrous investigation continued.

Memorials which had been before preceding Congresses were reintroduced as a basis of the Watrous investigation of 1860.

[80] Mr. Clement L. Vallandigham, of Ohio, held this view also, Globe, p. 85.
[81] Globe, pp. 37, 38.
[82] Globe, p. 84.
[83] Globe, pp. 95, 96.
[84] Globe, pp. 60, 61.
[85] Globe, p. 85.
[86] Globe, p. 90.
[87] Journal, pp. 69–71; Globe, p. 102.

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A minority of the Judiciary Committee were introduced to take testimony in the Watrous case.

In the Watrous investigation of 1860 the Judiciary Committee proceeded ex parte.

In the Watrous investigation of 1860 the Judiciary Committee, without special leave, considered the evidence and reports in preceding Congresses relating to this case.

The Judiciary Committee reported, in 1860, in favor of the impeachment of Judge Watrous.

On March 8, 1860,[88] during the next Congress, the memorial of Jacob Mussina was again introduced by Mr. Miles Taylor, of Louisiana, and that of Eliphas Spencer was presented by Mr. Andrew J. Hamilton, of Texas; and on March 12 [89] the memorial of William Alexander, first presented in 1851, was again presented by Mr. Hamilton. All these papers were referred to the Committee on the Judiciary.

On March 28 [90] the House gave the Judiciary Committee authority to send for persons and papers and to examine witnesses on oath or affirmation.

On May 18 [91] Mr. John Hickman, of Pennsylvania, stated that the committee found itself obliged to sit during sessions of the House, and therefore it was very difficult to keep a quorum. Hence he proposed this resolution, which was agreed to by the House without objection:

Resolved, That a minority of the Committee on the Judiciary be, and are hereby, authorized to take the testimony of all witnesses in the matter of the petitions heretofore referred to said committee praying the impeachment of Hon. John C. Watrous, a judge of the United States for the eastern district of Texas.

On May 21 [92] the House empowered the committee to print the memorial and testimony taken and to be taken in the case.

On December 17, 1860,[93] at the second session of the Congress, Mr. John H. Reynolds, of New York, asked unanimous consent to submit the report of the committee.[94] Mr. Horace Maynard, of Tennessee, reviewed the former proceedings in this case, intimated that the Committee on the Judiciary had been organized to further this impeachment, and declared that the time of the session was required for "the gravest and most important questions, going to the very existence and perpetuity of our Union." Therefore he objected.

On December 20 [95] Mr. Reynolds submitted the report, which concluded:

Resolved, That John C. Watrous, United States district judge for the eastern district of Texas, be impeached for high crimes and misdemeanors.

The committee say in their report:

That in view of the previous proceedings touching the matters committed to them, they entered upon the investigation at the first session of the present Congress in the belief that it was of the highest importance to the public interest, as well as to the accused, that some definite result should be reached, and some action taken which should be regarded as final. In the Thirty-fifth Congress much time was expended by the Judiciary Committee in the investigation of the charges

[88] First session Thirty-sixth Congress, Journal, p. 476.
[89] Journal, p. 493.
[90] Journal, p. 607.
[91] Journal, p. 856; Globe, p. 2171.
[92] Journal, p. 877; Globe, p. 2215.
[93] Second session Thirty-sixth Congress, Globe, p. 105.
[94] In the later practice such reports are privileged.
[95] Journal, p. 106; Globe, p. 159; Report No. 2.

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preferred, upon which Judge Watrous was heard by person and by counsel before the committee, a large amount of testimony was taken, and the committee were equally divided on the question of impeachment. The House, upon a consideration of the case, refused to adopt the resolution for an impeachment. Upon the present investigation the committee came to the conclusion to proceed ex parte, and they have accordingly taken additional evidence only in support of the charges against the accused. They have also considered the evidence before them taken during the Thirty-fifth Congress and the reports made to the House thereon, * * * and their proceedings are more properly to be regarded as a continuation of the former investigation than as an entirely original one. The additional evidence taken by the committee during the present Congress in respect to the charges upon which four members of the Judiciary Committee of the Thirty-fifth Congress recommended the adoption of a resolution of impeachment does not materially change the facts as they then appeared. But considerable evidence has been produced showing the connection of Judge Watrous with transactions of a character unfitting a judicial officer or an honest man, and which may not only present an independent ground of misbehavior deserving impeachment, but tends also to shed light upon the nature of his associations and private interests.

The committee adopt the conclusions of the four members who favored impeachment in the preceding Congress as to the charges in the Mussina and Spencer memorials, and then proceed to discuss the charges of the Alexander memorial, which they consider established and as justifying impeachment.

The report was postponed to December 27 but was not taken up on that day, and thereafter successive attempts to take it up on January 16, January 21, and January 28, 1861, failed,[96] through the objections of individual Members.

The Congress expired on March 3 and the report was not considered.

Amos Morrell was appointed judge on February 5, 1872, for the eastern district of Texas, and the records of the State Department show that this was the first appointment after the investigation of Judge Watrous.

2500. The investigation of the conduct of Judge Thomas Irwin in 1859.

Judge Irwin having resigned before the report of an investigation, the House discontinued proceedings.

On January 13, 1859,[97] the House authorized the Judiciary Committee to investigate charges made against Judge Thomas Irwin, of the United States district court of the western district of Pennsylvania. On January 28 [98] Mr. George S. Houston, of Alabama, reported from that committee that pending the investigation, "they had satisfactory evidence before them that the said judge had this day resigned his said office, and that the committee now ask the further direction of the House."

There was some discussion as to the publication of the testimony already taken; but as it had been taken only on one side it was thought best not to print it. Then, on motion of Mr. John S. Phelps, of Missouri, it was—

Ordered, That the said committee be discharged from the further consideration of the subject, and that the same be laid on the table.

2501. The investigation into the conduct of Henry A. Smythe, collector of the port of New York.

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[96] Globe, pp. 411, 499, 599, 600.
[97] Second session Thirty-fifth Congress, Journal, p. 178; Globe, p. 360.
[98] Journal, p. 278; Globe, p. 656.

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The House declined to institute impeachment proceedings before a committee had examined specially whether or not there was ground for impeachment.

A question as to the expediency of impeaching an officer removable by the Executive.

It is for the House to say whether or not a person whose conduct is being investigated shall be allowed to appear before the committee by counsel.

The House declined to ask of the Executive the removal of an officer whom a committee had found delinquent.

On March 15, 1867,[99] the House had directed the Committee on Public Expenditures to inquire into the conduct of Henry A. Smythe, collector of the port of New York, and to report thereon to the House if in their opinion the said Smythe had been guilty of bribery or other crimes and misdemeanors.

On March 25, 1867,[100] the Speaker, by unanimous consent, laid before the House a letter from Mr. Smythe, requesting that he might be permitted to appear with counsel to produce and examine witnesses before the committee.

Thereupon, Mr. Samuel J. Randall, of Pennsylvania, proposed the following:

Resolved, That the request of Henry A. Smythe, now collector of the port of New York, asking the privilege and permission to appear by counsel before the Committee on Public Expenditures, in defense of his conduct as collector, now being examined into by said committee, be granted.

Considerable discussion was occasioned by this proposition. It was urged that it was not the custom of the House to allow persons implicated by investigations before a committee to appear, especially by counsel, and Mr. Hulburd, while saying that his committee had allowed any person to come before them and produce witnesses under such circumstances, yet they had not allowed counsel, and should not do so without the consent of the House. Mr. John Covode, speaking from experience as chairman of an important investigating committee, said that he never allowed parties to appear by counsel except in one case, when Judge Black, a member of Mr. Buchanan's cabinet, was allowed counsel in a case where he was indirectly interested. On the other hand, it was recalled that in the Thirty-ninth Congress both Mr. Conkling and General Fry had appeared before the investigating committee by counsel; that in the investigation of the infringement of the privileges of the House by General Houston, he was allowed to appear with counsel; in the Thirty-seventh Congress a Member against whom charges had been made was allowed to appear by counsel; in the Thirty-fifth Congress Judge Watrous had also appeared with counsel, and also in a former Congress Judge Irwin had done the same. Mr. John A. Bingham, of Ohio, argued that the House ought always to judge of the propriety of allowing the official under investigation to appear; but in this case, of a subordinate officer of the Government, incapable in the nature of things of influencing the House or its committee, he should be allowed to appear by counsel.

[99] First session Fortieth Congress, Journal, pp. 51, 111; Globe, pp. 334–336.
[100] Journal, pp. 111, 112; Globe, pp. 334–336.

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The House, by a vote of 80 yeas to 35 nays, voted to suspend the rules for the consideration of the resolution, and then agreed to it.

On March 21, 1867,[101] Mr. Calvin T. Hulburd, of New York, from the Committee on Public Expenditures, had reported this resolution:

Resolved, That it is the sense of this House that Henry A. Smythe should be immediately removed from the office of collector of the port of New York, and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States.

Objection was made by Mr. Benjamin F. Butler, of Massachusetts, that the House should not request from the Executive the removal of any officer, but should proceed by impeachment. On March 22 [102] Mr. Thaddeus Stevens, of Pennsylvania, moved to amend by striking out all after the word "Resolved," and inserting—

That it is the sense of this House that Henry A. Smythe, collector of the port of New York, ought to be impeached; and that the Committee on Public Expenditures proceed forthwith to prepare articles of impeachment.

Objection was made to this amendment, especially by Mr. Samuel Shellabarger, of Ohio, that there was no precedent in the history of the Government for proceeding to an impeachment without investigation by a committee charged with finding whether or not there was ground for articles of impeachment. A question was also raised by Mr. Fernando Wood, of New York, as to whether the House ought to proceed to impeach an officer whom the President (or the President and Senate as provided under the tenure of office act) could remove. The right of the House to impeach such an officer was not disputed, but the expediency was questioned.

In accordance with the suggestions made, Mr. Stevens modified his amendment to read as follows:

That the testimony taken by the Committee on Public Expenditures relating to the conduct of Henry A. Smythe, collector of the port of New York, be referred to the said committee, with a view to ascertain whether or not said Smythe has been guilty of high crimes and misdemeanors sufficient to justify his impeachment; and if said committee find from that and other evidence that he has been thus guilty, then to proceed and prepare articles of impeachment, and report the same to this House; and that they have leave to send for persons and papers.

On March 22 and 23 [103] this amendment was considered and agreed to. The resolution as amended was then agreed to also.

On February 20, 1868,[104] on motion of Mr. Hulburd, the House agreed to a resolution empowering the committee to inquire into the receipts of Mr. Smythe in his official capacity, with authority to send for persons and papers.

It does not appear that the committee reported.

2502. The proposition to inquire into the conduct of William B. West, consul at Dublin.

The House declined to order an investigation of Consul West on evidence presented by a Member and referred the subject to a committee.

Mr. Speaker Colfax held that in order to be received as privileged a resolution must positively propose impeachment.

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[101] Journal, p. 80; Globe, pp. 255, 256.
[102] Globe, pp. 282–285.
[103] Journal, pp. 89, 95; Globe, pp. 284, 289, 290.
[104] Second session Fortieth Congress, Journal, pp. 371, 372.

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On December 2, 1867,[105] Mr. William E. Robinson, of New York, proposed as a question of privilege this resolution:

Resolved, That the Committee on Foreign Affairs be instructed to inquire into the conduct of William B. West, American consul at Dublin, in Ireland, regarding American prisoners in that city, and to report thereon forthwith, to the end that if he has been guilty of conduct which would be liable to impeachment this House may take measures to have articles of impeachment presented to the Senate.

Mr. John F. Farnsworth, of Illinois, raised the question of order that no question of privilege was involved.

The Speaker [106] held that as the resolution did not positively propose impeachment, it did not present a question of privilege.

Thereupon Mr. Robinson modified the resolution to read as follows:

Resolved, That William B. West, consul of the United States at Dublin, Ireland, be impeached before the Senate.

Mr. Robinson presented copies of correspondence between Mr. West and one Patrick J. Condon, who had been held as a political prisoner in Ireland, and other documents, which he considered as showing that Mr. West had not been sufficiently aggressive in maintaing the rights of American citizens abroad.

After debate on the general question of the rights of citizenship, the resolution was, on motion of Mr. Nathaniel P. Banks, of Massachusetts, referred to the Committee on Foreign Affairs.

It does not appear that further action was taken.

2503. The House, on the strength of a newspaper statement, ordered an investigation looking toward the impeachment of justice of the Supreme Court.—On January 30, 1868,[107] Mr. Glenni W. Scofield, of Pennsylvania, by unanimous consent, presented the following:

Whereas it is editorially stated in the Evening Express, a newspaper published in this city, on the afternoon of Wednesday, January 29, as follows:

"At a private gathering of gentlemen of both political parties, one of the justices of the Supreme Court spoke very freely concerning the reconstruction measures of Congress, and declared in the most positive terms that all these laws were unconstitutional, and that the court would be sure to pronounce them so. Some of his friends near him suggested that it was quite indiscreet to speak so positively, when he at once repeated the views in a more emphatic manner."

And whereas several cases under said reconstruction measures are now pending in the Supreme Court: Therefore,

Resolved, That the Committee on the Judiciary be directed to inquire into the truth of the declarations therein contained, and to report whether the facts as ascertained constitute such a misdemeanor in office as to require this House to present to the Senate articles of impeachment against said "justice of the Supreme Court," and the committee may have power to send for persons and papers, and have leave to report at any time.

Objection was made that a newspaper charge was insufficient ground for action by the House. Mr. Scofield disclaimed any knowledge himself. The House agreed to the preamble and resolution, yeas 97, nays 57.

On June 18 [108] Mr. George S. Boutwell, of Massachusetts, by instructions of the committee, moved that it be discharged from further consideration of the resolution, and that the same be laid on the table. This motion was agreed to without division or debate.

2504. The impeachment of Mark H. Delahay, United States district judge for Kansas.

[105] Second session Fortieth Congress, Journal, p. 9; Globe, pp. 3–9.
[106] Schuyler Colfax, of Indiana, Speaker.
[107] Second session Fortieth Congress, Journal, p. 274; Globe, p. 862.
[108] Journal, pp. 881, 882; Globe, p. 3266.

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The House voted to investigate the conduct of Judge Delahay after the Judiciary Committee had examined the charges in a memorial.

The Judiciary Committee was empowered in the Delahay case to take testimony in Kansas through a subcommittee.

In the investigation into the conduct of Judge Delahay he was permitted to present testimony.

On March 19, 1872,[109] Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, proposed a resolution, which was agreed to without debate:

Resolved, That the Committee on the Judiciary be, and they are hereby, authorized to send for persons and papers, to administer oaths, and to take testimony in the matter of the memorial and charges against Mark H. Delahay, district judge of the United States district for the State of Kansas.

On May 28 [110] Mr. John A. Bingham of Ohio from the Judiciary Committee, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be directed to further investigate the charges against the character and official conduct of M. H. Delahay, United States district judge for the district of Kansas, and for that purpose a subcommittee shall be authorized to sit during the recess of Congress, and may proceed to Kansas, subpoena witnesses, send for persons and papers, administer oaths, take testimony, and employ a clerk and reporter, the expense of which shall be paid from the contingent fund of the House on the order of the chairman.

In another case, relating to Judge Charles T. Sherman, Mr. Butler, citing the case of Judge Delahay, said that this subcommittee heard in Kansas such witnesses as Judge Delahay chose to have summoned.[111]

2505. Delahay impeachment continued.

The House, without division, voted to impeach Judge Delahay for improper personal habits.

The House voted the impeachment of Judge Delahay at the end of one Congress, intending to present articles in the next.

Forms and ceremonies for carrying of the impeachment of Judge Delahay to the Senate.

The Speaker gave the minority party representation on the committee to carry the impeachment of Judge Delahay to the Senate.

The impeachment of Judge Delahay was carried to the Senate by a committee of three.

On February 28, 1873,[112] Mr. Butler reported this resolution from the Judiciary Committee:

Resolved, That a committee of three be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach Mark H. Delahay, judge of the United States district court for the district of Kansas, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Mark H. Delahay to answer to said impeachment.

Two questions arose from this report:

1. Mr. Henry L. Dawes, of Massachusetts, asked if the Judiciary Committee, in view of the fact that the Congress was about to expire had settled the question whether or not the next House of Representa-

[109] Second session Forty-second Congress, Journal, p. 538; Globe, p. 1608.
[110] Journal, pp. 989, 990; Globe, p. 3926.
[111] Third session Forty-second Congress, Globe p. 2123.
[112] Third session Forty-second Congress, Journal, p. 512; Globe, pp. 1899, 1900.

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tives could present the articles of impeachment of which this House might notify them. Mr. Butler said:

The Committee on the Judiciary do not expect to prepare articles of impeachment against Judge Delahay and present them for trial at this session. In the earliest case of impeachment of a judge in this country, in 1803, the case of Judge Pickering, which was in all respects like this, this exact question arose and was settled. One House presented articles of impeachment to the Senate and another House at the next session prosecuted those articles, as will be done in this case. We do not expect any other action except the formal presentation of the articles of impeachment to the Senate. The Senate is a perpetual court of impeachment, and in presenting these articles we act only as a grand jury.

2. As to the offense for which the impeachment was to be the remedy, Mr. Butler stated that—

The most grievous charge, and that which is beyond all question, was that his personal habits unfitted him for the judicial office; that he was intoxicated off the bench as well as on the bench. This question has also been decided by precedent. That was the exact charge against Judge Pickering, of New Hampshire, who, with one exception, is the only judge who has been impeached.

Mr. Butler then had read testimony showing that the judge had sentenced prisoners when intoxicated, to the great detriment of judicial dignity.

There was also a question as to certain alleged corrupt transactions, but Mr. Daniel W. Voorhees, of Indiana, said it was not proven to the satisfaction of several members of the committee that there was any malfeasance. Mr. Butler said:

The committee agree that there is enough in his personal habits to found a charge upon, and that is all there is in this resolution.

The resolution of impeachment was then agreed to without division.

On March 3 [113] the Speaker announced the appointment of Mr. Butler, Mr. John A. Peters, of Maine, and Mr. Clarkson N. Potter, of New York, members of the committee. Two of these were members of the majority party in the House, and the third represented the minority.

On the same day [114] the committee appeared at the bar of the Senate and, having been announced, advanced toward the area in front of the Secretary's desk, and Mr. Butler said:

Mr. President, in obedience to the order of the House of Representatives, this committee of the House appear at the bar of the Senate of the United States, and do impeach Mark H. Delahay, district judge of the United States district court for the district of Kansas, in the name of the House of Representatives and all the people of the United States, for high crimes and misdemeanors in office. And we do further acquaint the Senate, by the order of the House, that the House will in due time furnish particular articles against said Delahay and make good the same. And this committee is further charged by the House to demand of the Senate that they will take order for the appearance of Mark H. Delahay, as such judge, to answer the same.

The Presiding Officer [115] said:

The Senate will take order in the premises, of which due notice shall be given to the House of Representatives.

Later, on the same day, on motion of Mr. George F. Edmunds, of Vermont, it was

Ordered, That the Secretary inform the House of Representatives that the Senate will receive articles of impeachment against Mark H. Delahay, judge of

[113] Journal, p. 551.
[114] Senate Journal, pp. 542, 543; Globe, pp. 2153, 2165.
[115] Henry A. Anthony, of Rhode Island, presiding officer.

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the district court of the United States for the district of Kansas, this day impeached by the House of Representatives before it of high crimes and misdemeanors, whenever the House of Representatives shall be ready to receive the same.

Meanwhile the committee had returned to the House of Representatives, where Mr. Butler, the chairman, submitted the following written report: [116]

That, in obedience to the order of the House, the committee have been to the Senate, and, in the name of the House of Representatives and of all the people of the United States, have impeached Mark H. Delahay, district judge of the United States for the district of Kansas, of high crimes and misdemeanors; and have acquainted the Senate that the House of Representatives will, in due time, exhibit particular articles against him, and make good the same. And further, that the committee have demanded that the Senate take order for the appearance of the said Mark H. Delahay to answer to the said impeachment.

A message was also received [117] in the House from the Senate in these terms:

The Senate is ready to receive articles of impeachment against Mark H. Delahay, judge of the United States district court for the State of Kansas.

No further proceedings took place. On March 10, 1874, as shown by the records of the State Department, Cassius G. Foster was appointed judge to fill a vacancy in this district.

2506. The investigation of the conduct of Edward H. Durell, United States district judge for Louisiana.

Instance wherein the House ordered an investigation of the conduct of a judge without a statement of charges, but in a case wherein common fame had made the facts known.

Instances wherein the House gave authority to prepare articles of impeachment at the time the investigation was ordered.

On January 13, 1873,[118] Mr. William D. Kelley, of Pennsylvania, moved that the rules be suspended so as to enable him to submit and the House to consider and agree to this resolution:

Resolved, That the Judiciary Committee be instructed to inquire into the conduct of Edward H. Durell, judge of the United States district court for the district of Louisiana, and ascertain and report whether, in the opinion of the committee, he has, for the purpose of overthrowing or controlling the government of the State of Louisiana, usurped jurisdiction not vested in the said district court by the Constitution or laws of the United States; and to report articles proposing the impeachment of the said Edward H. Durell if, in the judgment of the committee, he has abused his judicial functions by such usurpation of jurisdiction and unlawful interference with the constitutional privileges and rights of the people of said State; and that the committee have power to send for persons and papers.

The question being put, the rules were suspended, and the resolution was presented. And thereupon it was agreed to, without debate or division.

On January 21 [119] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that there was some uncertainty in the resolution first adopted, and asked for the adoption of the following:

Resolved, That in addition to the inquiries heretofore directed by the House to be made into the official conduct of Judge E. H. Durell, the Judiciary Com-

[116] House Report No. 92.
[117] House Journal, p. 560.
[118] Third session Forty-second Congress, Journal, p. 164; Globe, p. 541.
[119] Journal, p. 225; Globe, p. 761.

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mittee be instructed further to inquire whether said Durell should be impeached for high crimes and misdemeanors in office, and that said committee have leave to report at any time.

The resolution was agreed to by the House without division.

2507. The Durell investigation continued.

Instance wherein a House Committee charged with an investigation examined testimony taken before a Senate committee.

The Durell investigation was postponed in the Forty-second Congress because there was no time to permit Judge Durell to present testimony.

On March 3,[120] the last day of the Congress, Mr. John A. Bingham, of Ohio, submitted the report of the committee:

That they have examined to some extent the voluminous testimony taken before the Committee on Privileges and Elections of the Senate of the United States, and the bills, petitions, processes, and orders pending before said district court, and the action of said E. H. Durell thereon; and upon the legality and propriety of that action the most serious questions arise, and if the time at which this matter was brought before your committee by testimony permitted that proper investigation which ought to be had in a subject of so grave importance, your committee would proceed thereto.

It has been the practice of the Committee on the Judiciary to hear the accused in matters of impeachment whenever thereto requested, by witnesses or by counsel, or by both, as in their discretion would seem proper. Judge Durell has appeared before your committee and asked to be heard. At that hour in the session there was no time in which he could be heard, and for this reason only no further action has been taken by your committee.

We therefore report back the resolution with the recommendation that it be referred to the next House of Representatives for consideration, and that your committee be discharged from the further consideration thereof.

The report was laid on the table and ordered printed by the House.

2508. The Durell investigation continued.

A subcommittee, with power to send for persons and papers, was sent to Louisiana to investigate the conduct of Judge Durell.

A majority of the Judiciary Committee reported in favor of impeaching Judge Durell, principally for usurpation of power.

At the beginning of the next Congress, on December 17, 1873,[121] Mr. Jeremiah M. Wilson, of Indiana, submitted this resolution, which was agreed to:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized and directed to inquire and report to the House whether Judge E. H. Durell, judge of the district court of the United States for the southern district of Louisiana, shall be impeached for high crimes and misdemeanors; and that said committee shall have power to send for persons and papers.

On December 19 [122] Mr. Benjamin F. Butler, of Massachusetts, from the Judiciary Committee, reported the following resolution, which was agreed to by the House:

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to send a subcommittee of two members of said committee to New Orleans for the purpose of taking testimony in the matter of the impeachment of Judge E. H. Durell, heretofore referred to said committee, and that said subcommittee have power to send for persons and papers and to employ a stenographer.

Mr. Butler explained that the charges against Judge Durell related to bankruptcy proceedings, and that unless the committee should be

[120] Journal, p. 583; Globe, p. 2133; House Report No. 96.
[121] First session Forty-third Congress Journal, p. 141; Record, p. 266.
[122] Journal, p. 165; Record, p. 337.

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sent it might be necessary to have the bankruptcy records brought to Washington, or have copies of them made. Such a task would be long and expensive.

On June 17, 1874,[123] very near the end of the session, Mr. Wilson submitted the report of the majority of the committee, consisting of Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio. The report begins:

> Among the charges brought to the notice of your committee were those of drunkenness and the improper procurement of money by means of his judicial office. These charges are not sustained by the testimony, in the opinion of your committee, and therefore will not be further noticed.

The report finds more serious certain charges relating to the bankruptcy business of the court. Judge Durell had appointed E. E. Norton "official assignee in bankruptcy," and the latter had taken possession of the assets and estates of bankrupts in about 1,300 cases. "His charges were outrageously extortionate and seem to have been generally framed to absorb the estate," says the report; and it further cites an order by Judge Durell which prevented scrutiny into such charges. Norton also was found to have collusion with the auctioneers who made sales of bankrupt property, receiving more than $20,000 therefrom. The committee could not trace these facts directly to the knowledge of Judge Durell, although some testimony tended to show such knowledge. After citing evidence the report continues:

> The manner in which Norton was managing these affairs and the extortionate charges he was making were the subject of severe criticism in the newspapers of the city of New Orleans.
>
> The most intimate social relations existed between Judge Durell and Norton during all of this time. Judge Durell spent much of his time at Norton's house in the city of New Orleans. They traveled North together in the summer and spent much of their time together while North, returning South again together when the summer was over.
>
> These facts so notorious in regard to the management of so important trusts as those of the bankrupt estates, when taken in connection with the order hereinbefore referred to, lead to the inevitable conclusion by your committee that Judge Durell must have been cognizant of them, and therefore a corrupt party thereto, or that he was grossly negligent in the discharge of his official duties, so that, quacumque via data, he comes under a like condemnation.

And, finally, the report discusses a charge growing out of the Louisiana election of November 4, 1872. William P. Kellogg, Republican candidate for governor at that election, filed a bill in the United States circuit court against the then Governor Warmouth, McEnery, the Democratic candidate for governor, and certain others, alleging frauds for the purpose of disfranchising colored voters, and such an illegal purging of the State registration board as would enable the destruction of the evidence of the frauds; and therefore Mr. Kellogg prayed that a writ of injunction should issue, enjoining Warmouth from canvassing the returns except in the presence of the unpurged returning board, called the Lynch board. Warmouth filed answer denying the allegations. The motion for an injunction was heard and submitted on December 4, and on December 6 Judge Durell granted the injunction restraining Warmouth as prayed for in the bill. The report, after setting forth these preliminary facts, continues:

[123] Journal, p. 1218; Record, pp. 5124, 5125; House Report No. 732.

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In his opinion the judge speaks of Kellogg's bill as a bill "to preserve evidence." Assuming that this court had the power, by virtue of the acts of Congress, to preserve the evidence relating to the election of State officers, that end would have been answered and that power exercised by the injunction which prevented the destruction of the ballots, certificates, and evidences in question; and that was, as the Senate Committee on Privileges and Elections have said in their report of January, 1873, "the utmost that the court had authority upon this bill to do." The Constitution and acts of Congress gave no color of authority to a Federal court to determine what were the proper officers of the State or to restrain those who claimed to be so from action in respect of State matters.

On the 20th of November Warmouth signed an act passed by the last legislature which until that time he had delayed signing, which act appointed Wiltz, Deferiet, and others a returning board, and subsequently he submitted to them the votes and returns, which were compiled by that board, and they returned certifying the McEnery ticket as elected, and Warmouth, as governor, on the 4th of December, made proclamation thereof accordingly.

About these facts there is no dispute whatever.

The legislature thus declared to have been elected were about to assemble in the State house on the 6th of December. About 9 o'clock on the evening of the 5th of December Judge Durell sent for S. B. Packard, the United States marshal for the district. Packard went to his room. The judge told him to send for Mr. Billings and Mr. Beckwith, Kellogg's solicitors; that he proposed issuing an order for the occupation of the State house. The solicitors were sent for; they came, and the judge told them the same thing, and after some consultation the preparation of the order was set about. Judge Durell dictated it to Mr. Billings, who wrote it down, and the marshal's deputy, De Klyne, made a clean copy of the order thus dictated. The judge then signed it and delivered it to Packard, who thereupon set about executing it, which he did by calling on General Emory for a detachment of Federal troops, who occupied the State house that same night. This occupation resulted in securing the State government to Kellogg. This order declared that, whereas Warmouth had, in violation of the restraining order herein, issued the following proclamation and returns of certain persons claiming to be a board of returning officers, all in violation and contempt of the said restraining order, as follows, to wit [setting out the proclamation and returns], and proceeded:

Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and further to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana shall forthwith take possession of the building known as the Mechanics' Institute, and occupied as the State house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court; and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers, in contempt and violation of said restraining order; but the marshall is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

E. H. DURELL, *Judge.*

NEW ORLEANS, LA., *December 5, 1872.*

And it contained no other pretenses, recitals, or reasons for its issue.

It will be observed that none of the persons who composed the Wiltz and Deferiet board were members of the Lynch board, or named or mentioned in Kellogg's bill or Judge Durell's injunction. The act under which the Wiltz board was appointed seems to have been wholly overlooked, and no effort was made to restrain or prevent action under it; and although the judge declared that his midnight order was intended to prevent the obstruction of the proceedings in the Kellogg suit, and the violation of the orders of the court, the fact was these orders had not been violated nor the proceedings obstructured, nor was it possible that the canvass and return by the Deferiet board could obstruct or defeat the proceedings in that case, unless the object of that case was not, as pretended, to preserve evidences of right, but really to determine the validity of State elections. But the law had conferred and could confer no such power on a Federal court, and any proceedings to that end were necessarily coram non judice and void.

The report discusses at length the alleged usurpation practiced by Judge Durell, concluding:

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Such action, from whatever motive, is at variance with every principle of good government, is calculated to confound and subvert the distinctions between the State and Federal governments, and to overthrow the Constitution itself, without which neither Judge Durell nor any other judge has any rightful authority whatever.

Therefore the committee reported these resolutions:

Resolved, That Edward H. Durell, judge of the district court of the United States for the district of Louisiana, be impeached of high crimes and misdemeanors in office.

Resolved, That a committee of two be appointed to go to the Senate, and, at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Edward H. Durell, judge of the district court of the United States for the district of Louisiana, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment and make good the same; and that the committee do demand that the Senate take order for the appearance of said Edward H. Durell to answer to said impeachment.

Resolved, That a committee of seven be appointed to prepare and report articles of impeachment against Edward H. Durell, judge of the district court of the United States for the district of Louisiana, with power to send for persons, papers, and records, and to take testimony under oath.

Mr. Lyman Tremain, of New York, submitted minority views, which were concurred in by Messrs. William P. Frye, of Maine; John Cessna, of Pennsylvania, and Jasper D. Ward, of Illinois, dissenting from the majority report and recommending the discontinuance of all proceedings.

Mr. Luke P. Poland, of Vermont, filed individual views, saying:

First. In relation to the midnight order, although he believes the judge had no proper legal jurisdiction to make it, still he is not able to find that the judge acted corruptly or with any belief that he was going beyond his jurisdiction in making it. The law under which he acted was new and no rules or precedents had been established under it. The whole people were excited, the times were violent and turbulent, and judicial calmness or correctness could hardly be expected.

Second. The evidence seems to establish that some of the officers of Judge Durell's court were guilty of very corrupt practices, and that he was not watchful to scrutinize their conduct, but there is no claim that he ever shared in any of the proceeds of their gains and no direct evidence that he knowingly scantioned or approved their action.

Third. Where the evidence obtained by substantially an ex parte examination only secures a bare majority of the committee, it does not appear to me that the public interest will be furthered by presenting articles of impeachment to the Senate for trial.

A few days after this report was submitted this session of Congress adjourned without further action on it.

2509. The Durell investigation continued.

Judge Durell having resigned, the House discontinued impeachment proceedings.

Discussion of the effect of resignation of the officer upon impeachment proceedings.

Discussion of usurpation of power as a ground for impeachment.

At the next session, on January 7, 1875,[124] the resolutions came before the House, and it was then announced that Judge Durell had resigned his office, and that his resignation had been accepted.

A discussion arose as to two points:

1. As to the sentiments of the committee on the charges against Judge Durell.

[124] Second session Forty-third Congress, Journal, p. 139; Record, pp. 319–324.

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Mr. Benjamin F. Butler said that he had favored impeachment solely because of the midnight order. He did not consider the other charges proven. As to the midnight order, he said:

> That seemed to me not within the enforcement act. There was no bill under the enforcement act to put that order in action, but simply a proceeding to perpetuate testimony. It seemed to me so gross an exercise of power that if the judge did not know he was exceeding his powers he ought to have known it. And, in either case, if he did know, of course he was wrong; and if he did not know, he ought to have known, and therefore he did not conduct himself well in office. And upon that ground I voted as I did. * * * He acted upon his own motion, without any motion or argument before him, and that is what makes the gravamen of the offense charged against him; for without motion of the counsel for the complainant on this bill of equity, he, upon his own consideration and judgment, acted, and without any moving cause except in his own mind. * * * Now, while I will not hold a judge to be impeachable where he simply makes a mistake, yet if a judge, clearly outside of all possible jurisdiction, interferes with the liberty of a single citizen, I will hold him impeachable.

Mr. Lyman Tremain, of New York, who at the previous session had been one of the minority dissenting from impeachment, said that he had studied the case during the recess and had come to the conclusion that if the resolutions came to a vote he should vote for them, because of the midnight order. After reviewing the history of that order, Mr. Tremain said:

> Instead of being a judicial order, it seems to me to be a military order, an order which it seems was afterwards upheld and supported by the troops of the United States, and which it may therefore be fairly assumed was contemplated and intended to be so used. I find also that the marshal testifies that the judge gave him discretionary power by an oral direction to determine what persons should be admitted to the State-house and what persons should be excluded; thus deputing, not in writing, this vast discretionary power, and clothing the marshal with it. I can not believe that such an order as that can be justified by any consideration of charity.

Messrs. Storm and Poland, who had been of the dissenting minority, stated their belief that the order was wrong, but they did not consider that a wrongful intent was established. "Because this judge made an order he had no legal jurisdiction to make," said Mr. Poland, "it by no means follows he is amenable to impeachment, unless it can be established that that order was made corruptly or made with a knowledge on his part—with a belief that he was exceeding his legal jurisdiction."

Mr. Jeremiah M. Wilson stated that he believed the general opinion of those concurring in the majority report, was that Judge Durell was also impeachable for the irregularities in the bankruptcy proceedings.

2. As to the power to impeach a person who has resigned.

Mr. Butler stated that he had no doubt, as the Constitution imposed the punishment of disability for holding office thereafter, that the impeachment might proceed. But Judge Durell was an old man and there would be no practical benefit in going on with this case. Mr. Luke P. Poland stated that, while he had not examined the matter carefully, he had a very strong impression that the resignation would not avail as a legal obstacle to prevent the House from continuing the proceedings. It was a matter for the discretion of the House, according to the circumstances of the case.

Mr. Tremain said he had examined the question with considerable care, and he had very serious doubt "whether the House has any Constitutional power whatever to proceed by impeachment after the officer has resigned, his resignation has been accepted, and his successor

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has been appointed. The power to impeach rests entirely upon the Constitution of the United States. The whole system of English parliamentary impeachment, with the tremendous powers possessed by Parliament, has been superseded by our Constitution." Mr. Tremain said that the whole subject had been discussed by Judge Story, whose Commentaries he quoted in support of his view.

The question was taken on laying the resolutions on the table, and the motion was agreed to, yeas 129, nays 69. So the proceedings were discontinued.

2510. The inquiry as to the conduct of Schuyler Colfax, Vice-President of the United States.

In the Colfax case the majority of the Judiciary Committee concluded that the power of impeachment was rather remedial than punitive.

Discussion as to whether or not a civil officer may be impeached for an offense committed prior to his term of office.

A proposition to investigate the conduct of an officer and prepare articles of impeachment was held to be privileged.

On February 20, 1873,[125] Mr. Fernando Wood, of New York, proposed as a question of privilege, the following:

Resolved, That the testimony reported to this House by the special committee appointed under the resolution of the House of Representatives of December 2, 1872, for the investigation of charges of bribery in influencing Members of the House of Representatives, be referred to the Committee on the Judiciary, with instructions to report articles of impeachment against Schuyler Colfax, Vice-President of the United States, if in its judgment there is evidence implicating that officer and warranting impeachment.

Mr. Horace Maynard, of Tennessee, asked if a question of privilege was presented.

The Speaker [126] stated that such a question had been presented.

Mr. James N. Tyner having raised the question of consideration, the House, by a vote of yeas 105, nays 109, voted not to consider it.

Thereupon Mr. Tyner presented this resolution, which was agreed to without debate or division:

Resolved, That the testimony taken by the Committee of this House, of which Mr. Poland, of Vermont, is chairman, be referred to the Committee on the Judiciary, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a Member of this House, or makes it proper that further investigation should be ordered in this case.

This resolution was offered as involving a question of privilege, and its status as such was not questioned.

On February 24 Mr. Benjamin F. Butler, of Massachusetts, submitted the report [127] of the committee. This report, so far as it related to the subject of impeachment, was concurred in by Messrs. John A. Bingham, of Ohio, Benjamin F. Butler, of Massachusetts, Charles A. Eldredge, of Wisconsin, John A. Peters, of Maine, Lazarus D. Shoemaker, of Pennsylvania, Daniel W. Voorhees, of Indiana, and Jeremiah M. Wilson, of Indiana. Mr. Clarkson N. Potter, of New York, dissented.

For the purpose of applying the principles and precedents, the committee assumed all that could be inferred from the testimony in

[125] Third session Forty-second Congress, Journal, pp. 451, 452; Globe, pp. 1544, 1545.
[126] James G. Blaine, of Maine, Speaker.
[127] House Report No. 81, third session Forty-second Congress; Globe, p. 1651.

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regard to the Vice-President, Schuyler Colfax, who was the official referred to. They assumed that in the winter of 1867–68 he purchased of Oakes Ames stock of the Credit Mobilier at par when it was known to be worth much more than par; and that, from 1867 to 1869, while holding such stock, and while the House was considering subjects affecting the value of that stock, he presided over the House as Speaker. They found it undisputed that Mr. Colfax became interested in the Credit Mobilier before he became Vice-President, and that the motives which impelled the transaction were expected to operate upon him only as a Member of the House. Continuing, the committee say:

But we are to consider, taking the harshest construction of the evidence, whether the receipt of a bribe by a person who afterwards becomes a civil officer of the United States, even while holding another official position, is an act upon which an impeachment can be grounded to subject him to removal from an office which he afterwards holds. To elucidate this we first turn to the precedents.

Your committee find that in all cases of impeachment or attempted impeachment under our Constitution there is no instance where the accusation was not in regard to an act done or omitted to be done while the officer was in office. In every case it has been heretofore considered material that the articles of impeachment should allege in substance that, being such officer, and while in the exercise of the duties of his offices, the occused committed the acts of alleged inculpation.

The committee then cite briefly the impeachments of Judges Pickering, Chase, Peck, and Humphries, and President Johnson, in each of which the offense charged occurred during the term of office. Of impeachments under the State constitutions the rule seemed to be the same, unless the recent cases of Judges Barnard and McCunn, in New York, might present some exceptional features. In the Parliament of England, also, the committee found the same rule prevailing in all years since the rights of the subject and the principles of law and justice have become established.

From this so nearly "invariable current of precedent and authority" the committee turn to inquire:

What is the nature and what the objects of impeachments under our Constitution? Are they punitive or remedial? Or, in other words, is impeachment a constitutional remedy for removing obnoxious persons from office and preventing their again filling office, or a power given for punishing an officer, while he is an officer, for some crime alleged to have been committed by him before he was such officer?

The report answers these questions as follows:

Your committee are very strongly inclined to the opinion that impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive, except as an incident to the judgment, because we find that the Constitution limits the judgment in impeachment by strongly restrictive words: "Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States."

If such judgment is a punishment for an alleged high crime and misdemeanor, then why does the same article provide for the punishment of the accused a second time for the same offense? Because the words we have quoted are followed by the provision: "But the party convicted shall, nevertheless, be subject to indictment, trial, judgment, and punishment according to law."

This, therefore, would leave the party who had been removed from office and disqualified from holding office by the judgment of impeachment, if that is a punishment for his crime, to be the second time punished for the same offense, which is contrary to natural justice, against Magna Charta, and is most positively forbidden by the fifth article of amendment to the Constitution.

This article also throws some further light on this subject, because in its nervous language it enacts that "No person shall be held to answer for a capital

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or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Nor does it appear that this view is affected by the exception in section 2, Article III, of the Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury; this exception being necessary only to make the instrument consistent in all its parts with itself, as it had already provided that the impeached could be tried by jury for his crime.

Again, we find impeachment to be remedial in this, that it only provides, as a further consequence, disqualification for office, by which the evil is cured: that thereafter the Government may not have an officer who has so far forgotten his obligations to his official oath and to his duty as a citizen as to have been removed from office for high crimes and misdemeanors; again, by vote of the electors or appointment by the Executive, put in place of honor or trust.

We are also inclined to believe that proceedings of impeachment were intended to be remedial and not punitive, because we have already seen that if punitive at all an entirely inadequate punishment has been provided by the judgment; because the very highest offenses are triable by impeachment, such as treason and bribery, and the sentence may be only removal from an office whose term extends for a few days only, as in the case under consideration.

Again, we are brought to the conclusion that proceedings of impeachment are remedial and not punitive, because, in the case of Judge Pickering, before referred to, impeached for habitual intoxication, the officer was condemned because he became incapacitated for the performance of the duties of his office, and we find that impeachment is the only means known to our Constitution by which a civil officer of the United States, elected by the people, or a judge appointed by the Executive, can be removed from office. And certainly habitual intoxication, while it may not be a crime at common law or by statute, in a private person, may readily enough seem to be a very high crime and misdemeanor in a high civil officer, wholly incapacitating him from performing all his duties; so much so as to be made by the Articles of War a ground for removing an officer from the military service.

Again, your committee are inclined to believe that impeachment is not punitive, because, although an officer may have been tried and convicted of a high crime, yet he may be impeached for that very crime as a remedy for public mischief, and thus, in the converse of the proposition above stated, be twice punished for the same offense.

If the conclusions to which your committee have arrived in this regard are correct, it will readily be seen that the remedial proceedings of impeachment should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself.

The report was made in the House, February 24, and was briefly debated, after which it was postponed to February 26. But it was not considered that day, and does not appear to have been taken up thereafter.[128]

2511. The investigation into the conduct of Charles T. Sherman, district judge of the United States for the northern district of Ohio.

The House declined to vote the impeachment of a judge who had not been heard before the investigating committee.

Discussion of precedents in relation to ex parte investigations with a view to impeachment, including the case of President Johnson.

On February 22, 1873,[129] Mr. Ellis H. Roberts, of New York, presented as a question of privilege, and at the request of the Committee on Ways and Means, this resolution:

[128] Globe, pp. 1655, 1656; Journal, pp. 472, 473.
[129] Third session Forty-second Congress, Journal, p. 461; Globe, p. 1628.

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Resolved, That the evidence taken by the Committee on Ways and Means, under their authority to send for persons and papers in matters under examination pending before said committee, arising out of business referred to them by the House, be referred to the Committee on the Judiciary, with instructions to examine so much thereof as relates to Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, and determine whether further investigation of the conduct of said Sherman should not be had with a view of presenting articles of impeachment, if such investigation should, in their judgment, justify such action.

Without any question as to whether or not the resolution was privileged, and without division, the House agreed to it.

On March 3,[130] the last day of the Congress, Mr. Benjamin F. Butler, of Massachusetts, from the Committee on the Judiciary, reported that the testimony had come to the committee on the preceding day. There was therefore no time for the accused or his counsel to be heard, and as it had become the established practice of the Judiciary Committee to give such hearings in cases of impeachment, they reported the testimony back, to be placed on file for the consideration of the next House. Therefore Mr. Butler proposed this resolution:

Resolved, That the testimony be placed on file for the consideration of the next House of Representatives, and that the committee be discharged from the further consideration of the same.

Mr. Clarkson N. Potter, of New York, proposed the following as a substitute:

Whereas it appears by the letters of Charles T. Sherman, a judge of the district court of the United States for the northern district of Ohio, that he proposed to corruptly control legislation for money, to be paid to him by the stock exchange of New York, and subsequently insisted on such payment on the ground of such control, and threatened adverse legislation if the same was not paid; and whereas it further appears by the testimony of said Sherman before the Committee on Ways and Means of this House that his said pretenses of power to control legislation and his said a sertions of services he had rendered in this respect were false: Therefore,

Resolved, That a committee of three Members of this House be appointed by the Speaker to go to the Senate and at the bar thereof, in the name of the House of Representatives and of all the people of the United States, to impeach Charles T. Sherman, judge of the district court of the United States for the northern district of Ohio, of high misdemeanors in office, and acquaint the Senate that the House of Representatives will in due time exhibit particular articles of impeachment against him and make good the same; and that said committee do demand that the Senate take further order for the appearance of the said Charles T. Sherman to answer to said impeachment.[131]

The presentation of this proposed substitute caused an issue to be joined as to whether or not an officer ought to be impeached without an opportunity to be heard. It was explained that Judge Sherman had appeared before the Ways and Means Committee only as a witness, to answer such questions as were asked, and without power to explain or adduce evidence in his own behalf.

Those who favored delay to permit Judge Sherman to be heard seemed generally to consider that his conduct merited impeachment, Mr. Henry L. Dawes, of Massachusetts, saying that he did not see how he could make a satisfactory explanation, yet he believed that the opportunity should be given him.

Mr. Butler said that in the cases of Judges Pickering and Chase the opportunity to be heard was not given, but it had been conceded in "the

[130] Journal, pp. 571, 572; Globe, pp. 2122–2127.

[131] At this stage the simple resolution to impeach is usually presented. The above form is used after impeachment has been voted, to provide for taking the charge to the Senate.

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case of Judge Watrous, in the case of Judge Peck, in the case even of Andrew Johnson." There was dissent at this statement as to President Johnson, and Mr. Butler qualified it by saying:

He was notified of what was going on but never asked to appear.[132]

Mr. Butler went on to say that in the case of Judge Delahay they did not hear counsel, but sent a subcommittee to Kansas to hear such witnesses as Judge Delahay might choose to summon. Judge Busteed was heard by himself and by counsel. In this case Judge Sherman had made application to be heard, but the committee had no time to hear him.

Mr. Potter read letters of Judge Sherman which appeared to support the allegations of the preamble, and urged the adoption of the substitute.

After further debate the preamble and substitute were disagreed to by a vote of 32 ayes and noes not counted.

Then the resolution proposed by Mr. Butler was agreed to without division.

The records of the State Department show that Martin Walker was appointed judge of this district on November 25, 1873, and the vacancy was occasioned by the resignation and death of Judge Sherman.[133]

2512. The investigation into the conduct of Richard Busteed, United States district judge for Alabama.

The majority of the Judiciary Committee recommended the impeachment of Judge Busteed, principally for nonresidence.

A question as to the authority of Congress to make nonresidence of a judge an impeachable offense.

Judge Busteed having resigned, the House discontinued impeachment proceedings.

On December 15, 1873,[134] Mr. E. Rockwood Hoar, of Massachusetts. by unanimous consent, submitted the following resolution, which was agreed to·

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official conduct of the judge of the United States district court for the district of Alabama; and especially whether said judge had held terms of his court required by law: whether he has continuously and persistently absented himself from the said State; and whether his acts and omissions in his office of judge have been such as in any degree to deprive the people of that State of the benefit of a district court therein, and amount to a denial of justice.

On December 17,[135] Mr. Jeremiah M. Wilson, of Indiana, submitted the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary, to whom has been referred[136] the resolution requiring said committee to inquire into the conduct of the judge of the district court of the United States of the district of Alabama, shall have power to send for persons and papers.

On June 20, 1874,[137] Mr. Wilson presented the report of the committee for printing and recommitment.

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[132] Globe, p. 2123.
[133] John Sherman's Recollections, Vol. II, p. 726.
[134] First session Forty-third Congress, Journal, p. 127, Record, p. 209.
[135] Journal, p. 141; Record, p. 266.
[136] This is hardly accurate. The House agreed to the resolution, thereby instructing the committee.
[137] Journal, p. 1262; Record, p. 5316; House Report No. 773.

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The official referred to in these proceedings was Judge Richard Busteed.

It appears incidentally from the report that at least one witness was called at Judge Busteed's request, and was examined by "Mr. Busteed," which would suggest that the respondent acted in person or was represented by some attorney of the same name. Some of the testimony elicited shows pretty conclusively that Judge Busteed examined the witness personally.

Three charges appear in this case:

1. That Judge Busteed did not reside in the district as required by the acts of September 24, 1789, and December 18, 1812, the latter of which provided that "any person offending against the injunction or prohibition of this act shall be deemed guilty of a high misdemeanor."

The majority of the committee determined that the residence required by these laws was an actual residence. They say that Judge Busteed was appointed in 1865, being then a resident and large property owner in New York. Soon after his appointment he leased for three years a residence in Mobile, Ala., and removed his family there to reside. The report assumes that this removal was with the intent of becoming a permanent resident of the State. About two years afterwards, the house becoming untenantable, he abandoned his lease, his family came North, and have not since returned to Alabama. For the past seven years his family had not been in Alabama. The testimony showed that Judge Busteed had in New York real estate and personal property to a total value of about $300,000, including a house, but that he had no real estate in Alabama, and that his personal effects consisted of "a carpet, a music box, and a double-barreled gun." He lived with a relative in the New York house much of the year, going to Alabama in the fall to hold court, and returning in June, as soon as the courts were over. From this testimony the majority of the committee concluded that Judge Busteed was no resident of Alabama, "but only a sojourner from time to time for the purpose of holding terms of court."

2. The evidence showed much irregularity in holding courts—that in each division of the district he had frequently failed to hold the courts at the terms created by law. In one of them he had held no court since the spring of 1872, and in none of them had he held any court since the spring of 1873. Besides this, before those dates he held his courts irregularly, sometimes omitting altogether to hold them, being absent from the State. The committee concluded that the plea of ill health was not a sufficient excuse for these numerous and continued absences from duty.

3. It was also charged that Judge Busteed had used improperly the money of the United States and his official position to promote his personal interests. The committee found this charge sustained in respect to the remission of a fine by the judge in his court in order to relieve himself of a libel suit in the State courts.

Therefore the majority of the committee, Messrs. Benjamin F. Butler, of Massachusetts; Jeremiah M. Wilson, of Indiana; Luke P. Poland, of Vermont; Alexander White, of Alabama; Charles A. Eldredge, of Wisconsin; Clarkson N. Potter, of New York, and Hugh J. Jewett, of Ohio, concurred in recommending this resolution:

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Resolved, That Richard Busteed, judge of the district court of the United States for the southern, middle, and northern districts of Alabama, be impeached for misdemeanors in office.[138]

Messrs. John Cessna, of Pennsylvania; William P. Frye, of Maine; Jasper D. Ward, of Illinois, and Lyman Tremain, of New York. dissented from the conclusion of the majority of the committee.

Soon after this report was printed the session of Congress ended.

At the next session, on January 7, 1875,[139] the report was taken up. In the meantime Judge Busteed had resigned his office and the resignation had been accepted.

Mr. Tremain expressed a doubt as to whether or not nonresidence was an impeachable offense. "High crimes and misdemeanors" must be taken to mean such offenses as were high crimes and misdemeanors when the Constitution was framed. It might be doubted whether a subsequent law proposing to make a specific offense a high crime or high misdemeanor would be constitutional.

This report being taken up immediately after the disposition of the *Durell* case, Messrs. Butler and Wilson took occasion to emphasize their opposition to the theory that an officer might escape impeachment by resignation.

The question being taken on discharging the Committee on the Judiciary from the consideration of the subject and laying it on the table, the motion was agreed to without division. So the proceedings were discontinued.

2513. The investigation into the conduct of William Story, United States judge for the western district of Arkansas.

Memorials containing charges against Judge Story were referred to the Judiciary Committee for examination before the House voted a formal investigation.

On February 26, 1874,[140] Mr. James G. Blaine, of Maine, presented to the House memorials of James S. Robinson, of Fort Smith, Ark., and of Ben. T. Du Vol, James S. Gage, and others, practicing attorneys of Fort Smith, containing charges and specifications against William Story, judge of the United States district court for the western district of Arkansas. These memorials were presented at the Clerk's desk under the rule, and under the rule were referred to the Committee on the Judiciary.

On April 28 [141] Mr. Jeremiah M. Wilson, of Indiana, from the Committee on the Judiciary, stated that the memorials presented contained nineteen specifications. The committee had been examining the case for some time, but now needed further authority, and he proposed this resolution, which was agreed to by the House without division:

Resolved, That the Committee on the Judiciary be, and is hereby, instructed to inquire whether Judge William F. Story, judge of the district court of the United States for the western district of Arkansas, shall be impeached for high crimes and misdemeanors, and that said committee have power to send for persons and papers.

On June 20, 1874,[142] Mr. John Cessna, of Pennsylvania, from the Committee on the Judiciary, presented a resolution providing that the

[138] Two other resolutions providing for carrying the impeachment to the Senate and for a committee to prepare articles accompanied this resolution. They were similar to the resolutions in the Durell case.
[139] Second session Forty-third Congress, Journal, pp. 140, 141; Record, pp. 324–326.
[140] First session Forty-third Congress, Journal, p. 511; Record, p. 1825.
[141] Journal, p. 869; Record, p. 3438.
[142] Journal, p. 1262; Record, p. 5316.

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evidence taken in this matter by the Judiciary Committee be furnished by the Clerk of the House to the Attorney-General, Secretary of the Treasury, and Third Auditor and First Comptroller of the Treasury, "for their information and guidance, with the recommendation that such action be taken by the said Departments as will restore to the Treasury of the United States any moneys wrongfully paid to any of the officers of said court, and to prevent any such wrongful payments hereafter." This resolution was agreed to with an amendment including also a copy of testimony taken before the Committee on Expenditures in the Department of Justice.

2514. The investigation into the conduct of George F. Seward, late consul-general at Shanghai.

The Seward investigation was set in motion by a memorial.

In the Seward investigation the respondent was represented by counsel and in person before the committee.

An opinion of the Judiciary Committee that a person under investigation with a view to impeachment may not be compelled to testify.

An instance wherein a committee charged with the investigation reported articles with the resolution of impeachment.

On January 23, 1878,[143] the Speaker laid before the House a communication from John C. Myers, later consul-general at Shanghai, China, asking that an investigation might be had concerning the administration of the consulate-general at Shanghai, during the terms in office of Hon. George F. Seward, present minister to China; O. B. Bradford, vice-consul-general and consular clerk; and himself as consul-general.

The memorial was first referred to the Committee on Foreign Affairs, but later the reference was changed to the Committee on Expenditures in the State Department.

The Committee on Expenditures in the State Department, by a resolution of January 11, 1878,[144] had been empowered generally to investigate the affairs of the State Department, and under this authority they proceeded to take testimony on the subject of the memorial.

It appears [145] that counsel was permitted to represent Mr. Seward before the committee, and later the investigation was suspended in order that Mr. Seward might leave his post and appear before the committee to assist in cross-examination of witnesses. The committee, however, made the condition of this concession, that Mr. Seward should produce papers in his possession relating to the consul-generalship at Shanghai during his incumbency of the office. Mr. Seward did not produce the papers, did not obey a subpoena duces tecum, and declined the oath as a witness, urging that the fifth amendment to the Constitution provided that "no person shall be compelled, in any criminal case, to be a witness against himself."

The issue thus raised was referred to the Committee on the Judiciary, who reported on March 3, 1879,[146] Mr. Benjamin F. Butler, of

[143] Second session Forty-fifth Congress, Journal, pp. 268, 269, 273.
[144] Journal, pp. 158, 159.
[145] House Report No. 117, third session Forty-fifth Congress.
[146] Third session Forty-fifth Congress, Report No. 141.

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Massachusetts, making the report. The general question of the production of papers was discussed,[147] and also the report said on the question of testimony:

> Investigations looking to the impeachment of public officers have always been finally examined before the Judiciary Committee of the House, so far as we are instructed; and it is believed that the case can not be found as a precedent where the party charged has ever been called upon and compelled to give evidence in such case. We distinguish this case from the case of an ordinary investigation for legislative purposes, where all parties are called upon to give such evidence (oral or written) as may tend to throw light upon the subject of investigation; but even in those cases it was early held that a person called as a witness, and not a party charged before the committee, was not bound to criminate himself; and a statute familiar to the House, for the protection of witnesses under such circumstances, from having the evidence given used against them, was passed.
>
> In making an investigation of the facts charged against an officer of the United States looking to impeachment, the House acts as the grand inquest of the nation to present that officer for trial before the highest court known to our Constitution—the Senate of the United States—for such punishment as may be constitutionally imposed upon him, which is very severe in its penalties, and even then does not exonerate the party from further prosecution before the proper courts for offenses against the laws.

On March 1, 1879,[148] before the report of the Judiciary Committee had been submitted to the House, Mr. Springer presented the report of the majority of the Committee on Expenditures in the State Department.[149] The report consisted of seventeen articles of impeachment, charging that as judge of the consular court, while consul-general, he had corruptly received money in the settlement of estates and in other judicial matters; that he had converted to his own use certain funds intrusted to him as consul-general; that he had used his official influence to promote the construction of a railway in violation of law and treaty; that he had converted to his own use fees belonging by law to the marshal of the consulate, by virtue of an unlawful agreement with the said marshal; that he had, by means of falsified accounts, converted to his own use certain premiums of exchange; that he unlawfully took the salary of his office as consul-general after he had become minister of the United States to China, and while receiving the salary of the latter office; that as minister to China he unlawfully suspended John C. Myers, then being consul-general at Shanghai, and procured the appointment of one Oliver B. Bradford to the place, for the purpose "to secrete and conceal the crimes committed as aforesaid;" and that he had neglected willfully to render true and just quarterly accounts of his office, and embezzled the public moneys of the United States; that as minister to China he unlawfully endeavored to procure and did procure the release of Oliver B. Bradford from the consular jail, whither he had been committed for embezzlement, and permitted him to go at liberty; and that he unlawfully took from the consulate-general at Shanghai certain account books, the property of the United States, and carried them away "with intent to conceal, destroy, or steal the same, and ever since has and still does conceal the same, and refuses to deliver the same up as required by law."

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[147] See sections 1699, 1700 of this volume for general aspects of the subject.
[148] Journal, pp. 621, 624, 625, 642, 649, 659, 664; Record, pp. 2374, 2378, 2384, 2778.
[149] For this report in full, see Journal, pp. 624–633.

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The committee therefore recommended this resolution:

Resolved, That George F. Seward, late consul-general of the United States of America at Shanghai, China, and now envoy extraordinary and minister plenipotentiary of the United States of America to China, be impeached of high crimes and misdemeanors while in office.

Two other resolutions accompanied, providing for presentation of the impeachment in the Senate and for the appointment of a committee to frame articles of impeachment.

Mr. Solomon Bundy, of New York, presented views of the minority, with this resolution:

Whereas, in view of the great importance of the subject and matters embraced in the report of the majority of the committee in the matter of the proposed impeachment of George F. Seward for alleged high crimes and misdemeanors, and the complicated questions of law involved therein: Therefore

Resolved, That the matters embraced in such report, together with the evidence in the case, be referred to the Committee on the Judiciary.

On March 3,[150] the last day of the Congress, the House, by a vote of yeas 132, nays 109, voted to consider the report; but thereafter dilatory proceedings prevented action on it.

2515. The investigation into the conduct of Oliver B. Bradford, late vice-consul-general at Shanghai.

A question as to whether a vice-consul-general is such an officer as is liable to impeachment.

The Bradford investigation was set in motion by a memorial in which charges were preferred.

On March 22, 1878,[151] Mr. William M. Springer, of Illinois, from the Committee on Expenditures in the State Department, to whom had been referred a memorial of John C. Myers relating to the affairs of the consulate-general at Shanghai, China, reported a recommendation that Oliver B. Bradford, late vice-consul-general at Shanghai, China, and now holding the office of postal agent of the United States at Shanghai, and also the office of consular clerk of the United States assigned at Shanghai, be impeached at the bar of the Senate of high crimes and misdemeanors in office. The committee transmitted with their report the testimony taken, and also as part of their report, ten articles of impeachment, setting forth the charges against the said Bradford: (1) That in abuse of his official position he became interested in the construction of a railroad in China, violating treaties between the United States and China, and in violation of acts of Congress; (2) that in the construction of the said railroad he used his official position to further a fraudulent scheme; (3) that in five specified cases he has used his office to exercise oppressive, extortionate, and corrupt activity against American citizens; (4) that he embezzled a letter from the post-office at Shanghai; (5) that he unlawfully took from the post-office and opened another letter; (6) that he transmitted a false salary voucher to the United States Treasury to cover the withholding of a portion of the salary of an employee; (7) that as disbursing officer he defrauded the United States Government; (8) that he again was guilty of fraud as disbursing officer; (9) that he embezzled a sum of money belonging to the United States; (10) and that he unlawfully deposited to his own account a sum of money belonging to the United States.

[150] Journal, pp. 621, 622.
[151] Second session Forty-fifth Congress, Journal, p. 1127; Record, p. 3667; House Report No. 818.

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In view of these specifications the committee recommended this resolution:

Resolved, That Oliver B. Bradford, now consular clerk of the United States, assigned to Shanghai, China, and postal agent of the United States at Shanghai, China, and late vice-consul-general of the United States at Shanghai, China, and late clerk of the consular court of the United States at Shanghai, China, be impeached by the House of Representatives at the bar of the Senate, for high crimes and misdemeanors while in office.

Mr. Springer announced in the report that two members of the committee, Messrs. Mark H. Dunnell, of Minnesota, and Solomon Bundy, of New York, entertained grave doubts whether Mr. Bradford was such an officer as was liable under the Constitution to impeachment. All of the committee agreed that the evidence sustained the charges. In view of the constitutional question involved, Mr. Springer moved that the whole subject be referred to the Judiciary Committee. This motion was agreed to without division.

2516. The investigation of the conduct of Henry W. Blodgett, United States judge for the northern district of Illinois.

In the case of Judge Blodgett the House ordered an investigation upon the presentation of a memorial specifying charges.

In the investigation of Judge Blodgett both the complainants and the respondent were represented by counsel and produced testimony before the committee.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated the conduct of Judge Blodgett.

The committee and the House acted adversely on a proposition to impeach Judge Blodgett for an act in excess of his jurisdiction, bad faith not being shown.

On January 7, 1879,[152] Mr. Carter H. Harrison, of Illinois, presented the memorials of certain citizens of Chicago asking for the appointment of a special committee to visit that city and investigate certain charges, therein set forth, against Henry W. Blodgett, district judge of the northern district of Illinois. Mr. Harrison also presented a preamble and resolution, which, after amendment, was agreed to by the House, giving the Judiciary Committee authority to investigate the charges.

On March 3,[153] Mr. J. Proctor Knott, of Kentucky, presented the report of the committee.

As to the method of investigation the report says:

That during the taking of the testimony herewith submitted, Judge Blodgett and Messrs. Cooper, Knickerbocker, and Sheldon, upon whose memorial the resolution recited above was introduced and adopted, were present in person and with consul. Both parties were permitted to introduce evidence, and the most liberal latitude was allowed to each in the examination of witnesses to the end that every fact bearing directly or remotely upon the subject under consideration might be clearly ascertained. In order to facilitate the investigation as much as possible, however, and to enable the committee to confine the testimony within reasonable limits, and present it to the House in something like a systematic form, the memorialists were requested to present their charges and specifications in writing, which was accordingly done, and copies thereof delivered to Judge Blodgett with the request that he would file written answers thereto, if such answers should be deemed by him necessary or desirable.

The report then discusses the charges, which were:

1. That Judge Blodgett had entered into a dishonest conspiracy to defraud, by aid of his acts as judge, the creditors of a certain corporation.

[152] Third session Forty-fifth Congress, Journal, p. 138.
[153] Journal, p. 671; Record, pp. 2388, 2390–2395; House Report No. 142.

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2. That he had improperly attempted to prevent the grand jury from finding an indictment against one Homer N. Hibbard, for perjury.

3. That while holding the office of judge he had knowingly borrowed and converted to his own personal use money belonging to or deposited in the registry of his court.

4. That as judge he had willfully employed the power and authority of the court to perpetrate acts of gross judicial oppression upon the rights of a private citizen, and sanction and direct the commission of a flagrant trespass which constituted a criminal offense under the laws of the State of Illinois, punishable by fine and imprisonment.

5. That in administering the bankrupt law he had willfully violated the letter and spirit of the law by making an unlawful use of his power as judge to enrich his friends and favorites, to the reproach and scandal of the court.

6. That he had corruptly used his official position to aid a conspiracy to defraud the stockholders of a certain insurance company, by enabling certain persons to buy up the stock at a discount.

The committee found in general that the charges were not sustained by the evidence; but in discussing the fourth charge they say:

> It may be conceded that Judge Blodgett acted in this instance in excess of his jurisdiction. * * * However justly, therefore, Judge Blodgett may be amenable to criticism or censure on account of his action in this matter * * * it is impossible to see how he can be held liable to impeachment therefor, unless it can be shown that he did not act in good faith for the best interests of those concerned, as he understood them, but with such malice and corruption as to render his act in the premises an official misdemeanor.

In view of all the evidence the committee, without dissent, recommended this resolution:

> *Resolved*, That the charges against Henry W. Blodgett, United States district judge for the northern district of Illinois, be laid on the table, and the House take no further action thereon.

This resolution was agreed to by the House without division.

2517. The investigation into the conduct of Aleck Boarman, United States judge for the western district of Louisiana.

A Member of the House presented specific charges against Judge Boarman to the Judiciary Committee, which had been empowered to investigate the judiciary generally.

A subcommittee visited Louisiana and took testimony against and for Judge Boarman.

The Member who lodged charges against Judge Boarman conducted the case against him before the subcommittee.

Judge Boarman made a sworn statement or answer to the committee investigating his conduct in 1890, but did not testify.

The inquiry of 1890 into the conduct of Judge Boarman was conducted according to the established rules of evidence.

In 1890 the Judiciary Committee concluded that Judge Boarman should be impeached for an act in violation of the statute.

On March 1, 1890,[154] Mr. William C. Oates, of Alabama, from the Committee on the Judiciary, to whom had been referred, on February 18, 1890, a resolution providing for an investigation of "the practice of certain United States district courts and other officers in criminal cases," reported the resolution with an amendment in the nature of a substitute. To show the desirability of such investigation the report cites a letter from the Attorney-General to the chairman of the com-

[154] First session Fifty-first Congress, Journal, p. 296; House Report No. 566.

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mittee and letters from the Commissioner of Internal Revenue and one of the Auditors of the Treasury. In addition to these letters numerous complaints had been made by persons seeming to be well informed and reputable; and also there had been complaints in the newspapers. Therefore an investigation seemed to the committee desirable, and they recommended a substitute amendment providing for a general investigation, including "maladministration or corrupt official conduct of any of the officers connected with the judicial department of the Government."

On April 1 [155] the House agreed to the resolution with the proposed amendment; and on September 16 [156] the committee was given authority to continue its investigation through the recess of Congress.

On February 17, 1891,[157] Mr. Albert C. Thompson, of Ohio, submitted the report of the committee. This report dealt generally with the subject referred to the committee, and also presented an ascertainment of fact in relation to Aleck Boarman, district judge for the western district of Louisiana. The report states that while the committee were investigating the general subject a letter was, in May, 1890, addressed to the chairman of the committee by Mr. C. J. Boatner, Member of the House from the Fifth District of Louisiana, preferring seven specific charges against Judge Boarman, and asking that a date be fixed when the charges might be substantiated by witnesses. Thereupon a subcommittee of the Committee on the Judiciary visited Shreveport and New Orleans and took testimony relating to the charges. Both Judge Boarman and Mr. Boatner were present at Shreveport, but neither attended at New Orleans. Mr. Boatner conducted the examination of witnesses called to sustain the charges, and Mr. Albert H. Leonard appeared as counsel for Judge Boarman. The report further says:

> The subcommittee before whom the testimony was taken aimed to admit nothing inadmissible under the well-established rules of evidence, but, notwithstanding the care exercised, much is found in the record that is not legal evidence. In reaching the conclusions, however, hereinafter stated, the committee endeavor to eliminate from their consideration those matters that are plainly hearsay and neighborhood gossip, and base their judgment, it is believed, upon substantial and trustworthy evidence.
>
> Judge Boarman did not testify before the subcommittee, nor did he introduce any oral testimony whatever, except that of Mr. Albert H. Leonard and a "statement" made by Mr. M. C. Elstner, the latter being entirely personal to Mr. Elstner himself and having no bearing upon any of the issues raised. The answer of Judge Boarman, hereinbefore referred to, is given its full legal effect, as an answer, and is taken to be true except in those particulars wherein its averments are overcome by countervailing legal testimony.

The answer of Judge Boarman, filed at the first meeting of the committee, is printed in the report, and begins as follows:

> In the matter of certain charges and complaints made by C. J. Boatner against Aleck Boarman, judge, western district of Louisiana, to the subjudiciary committee of the House of Representatives, sitting at Shreveport, La., the Hon. A. C. Thompson, chairman.
>
> Respondent, in answer to said charges, respectfully makes the following answer and statements under oath:
>
> He denies each and every allegation made against him, except what is hereinafter admitted.
>
> First charge. Respondent denies, etc.
>
> * * * * * * *

[155] Journal, p. 416; Record, p. 2877.
[156] Journal, p. 1046.
[157] Second session Fifty-first Congress, Journal, pp. 254, 270; Record, pp. 2797, 2937; House Report No. 3828.

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Respondent submits this answer to said charges, and respectfully asks now, as he has, to the knowledge of the committee, heretofore done, that such a thorough investigation shall be made as will best subserve the public interest.

ALECK BOARMAN.

Sworn to and subscribed before me this November 17, 1890.

[SEAL] J. B. BEATTIE, *Clerk.*

Upon the filing of the answer Mr. Boatner asked and was granted leave to amend the charges against Judge Boarman by the addition of another specification.

The committee concluded as to all the charges except the fourth that while there was much in the testimony warranting severe criticism of his acts yet he should be acquitted; but on the fourth charge the committee were unanimous that he should be impeached. This charge was that he had "used for his own purposes the funds paid into the registry of his court, and has unlawfully and corruptly failed and refused to decide causes in which the funds in dispute were or should have been in the registry of his court, and also (additional charge) that the respondent repeatedly borrowed money from the marshal of this court, contrary to law." The report quotes sections 995, 996, and 5505 of the Revised Statutes, and rule 42 governing district courts in admiralty cases, and says:

The committee profoundly regret that from the evidence taken and fully appearing in the record there appears to have been no attempt on the part of Judge Boarman to comply with the statute and the rules of court as to moneys paid to the clerk. His practice in this regard, if not criminal, is reprehensible in the extreme.

Therefore the committee, without dissent, reported this resolution:

Resolved, That Aleck Boarman, judge of the United States district court for the western district of Louisiana, be impeached of high crimes and misdemeanors.

The House considered the resolution on February 28,[158] which was next to the last legislative day of the Congress, but the debate, which was entirely in favor of impeachment, was not concluded, and the resolution failed to be acted on.

2518. The Boarman investigation continued.

In 1892 the House referred to the Judiciary Committee the evidence taken in the Boarman investigation of 1890 as material in a new investigation.

At the investigation of 1892 Judge Boarman testified and was cross-examined before the committee.

The second investigation of Judge Boarman having revealed an absence of bad intent in his censurable acts, the committee and the House decided against impeachment.

A Member who had preferred charges against Judge Boarman declined, as a member of the Judiciary Committee, to vote on his case.

In the first session of the next Congress, on January 13, 1892,[159] Mr. Boatner submitted a resolution directing an investigation of the charges against Judge Boarman and it was referred to the Committee on the Judiciary.

On January 30 [160] Mr. Oates reported from the committee, in lieu of that resolution, a preamble reciting the proceedings in the former Congress, especially citing the fact that the evidence taken was not ex parte, and that the respondent had been present in person or by coun-

[158] Journal, p. 330; Record, pp. 3595–3597.
[159] First session Fifty-second Congress, Journal, p. 26.
[160] Journal, p. 49; Record, p. 689.

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sel when it was taken, and a resolution referring the report made in the last Congress, the charges and the evidence, to the Committee on the Judiciary, with instructions to investigate the same thoroughly, and further providing: "And for the purposes of making the investigation hereby ordered the said Committee on the Judiciary may adopt and use as legal evidence the testimony taken as aforesaid," and "may take and consider any additional and explanatory evidence of a legal character which may be offered either for or against said judge."

This resolution was agreed to, and the committee made the investigation

On June 1,[161] Mr. Oates submitted the report of the committee.

As to the manner of investigation the report shows that it was conducted by a subcommittee, and says:

> Your committee found it unnecessary to take any additional testimony after having adopted that taken by its predecessor in the Fifty-first Congress. Upon due inquiry it was found that there were no other witnesses to be examined in behalf of the Government touching the said charges, and therefore the said judge was notified that if he had any exculpatory or explanatory evidence which he wished to offer that he should have the opportunity of doing so. He then came to Washington, appeared before said special subcommittee, and gave his testimony.

A reference to the printed testimony [162] shows that Judge Boarman testified at length and was then cross-examined by members of the committee. He explained his conduct as to the various charges.

The committee investigated the seven former charges and one new one. The committee found in favor of the judge as to the new charge; and also found in his favor as to the old charges, including that numbered four, on which the committee has found against him in the preceding Congress. As to the fourth charge the report says:

> It will be seen in this testimony that the judge claims to have been entirely ignorant of the existence of this statute. (Sec. 5505 relating to receiving from the clerk money belonging to the registry.) He says that it looks like a humiliating confession for a judge to make, and the committee agree with him in that statement. Ignorantia legis non excusat is a maxim of the law, applicable alike to the ignorant and the learned. It can not, therefore, be taken as any excuse whatever for his conduct in this case. He is, by his own confession technically guilty of embezzlement. There are, however, extenuating circumstances. Wheaton, the clerk, was upon his death bed when he gave the judge the orders * * * for this money. He told the judge that he was going to die, and that this money belonged in the registry of the court, and he did not wish it to go into his succession or estate. The judge swears that his motive in receiving the money was to preserve it unincumbered for the suitors who would be entitled to it when the distribution was decreed; and while he admits that he may have converted a part of it to his own use, if he did he replaced it with the new clerk, and thus those who were entitled to it received their money. While, therefore, the taking of the money by the judge was a statutory embezzlement, it can not be said from the evidence that he took it lucri causa, or with dishonest intent.

The committee find the second branch of the fourth charge—relating to corrupt failure to decide cases—not sustained.

The committee found that Judge Boarman's conduct had not been such as to absolve him from censure, but they failed to find that he "had been influenced by corrupt or dishonest motives." Therefore they asked to be discharged from further consideration of the case.

The report also says:

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[161] Journal, p. 207; Record, p. 4908; House Report No. 1536.
[162] See pp. 57–72 of Report No. 1536.

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Hon. C. J. Boatner, now a member of this committee, having preferred the charges against Judge Boarman in the Fifty-first Congress, declined to vote on any of the propositions embraced in the foregoing report.

The report of the committee was concurred in by the House without division.

2519. The inquiry into the conduct of J. G. Jenkins, United States circuit judge for the seventh circuit.

The investigation of the conduct of Judge Jenkins was suggested by a resolution offered by a Member and referred to the Judiciary Committee.

Form of resolution authorizing the investigation into the conduct of Judge Jenkins.

Instance wherein a majority of the Judiciary Committee reported a resolution censuring a judge for acts not shown to be with corrupt intent.

On February 5, 1894,[163] Mr. Lawrence E. McGann, of Illinois, proposed a resolution to investigate and report whether or not the Hon. J. G. Jenkins, judge of the United States circuit court for the seventh circuit, has abused the powers and process of said court or oppressively exercised the same to oppress the employees of the Northern Pacific Railroad Company. This resolution was referred to the Committee on the Judiciary.

On March 6, 1894,[164] Mr. Charles J. Boatner, of Louisiana, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Resolved, That the Committee on the Judiciary of the House be, and is hereby, authorized to speedily investigate and inquire into all the circumstances connected with the issuance of writs of injunction in the case of the Farmers' Loan and Trust Company, complainant, against the Northern Pacific Railroad Company, defendant, in the United States circuit court for the eastern district of Wisconsin, and the several matters and things referred to in the resolution introduced on the 5th day of February, instant, charging illegalities and abuse of the process of said court therein and report to this House whether in any of said matters or things the Hon. J. G. Jenkins, judge of said court, has exceeded his jurisdiction in granting said writs, abused the powers or process of said court, or oppressively exercised the same, or has used his office as judge to intimidate or wrongfully restrain the employees of the Northern Pacific Railway Company, or the officers of the labor organizations with which said employees or any of them were affiliated, in the exercise of their rights and privileges under the laws of the United States; and if so, what action should be taken by this House or by Congress.

On June 8 [165] Mr. Boatner submitted the report of the committee. This report relates the history of the appointment of receivers for the Northern Pacific Railroad Company by Judge Jenkins, in conjunction with other judges in whose territory the property lay; of the successive reductions of the wages of employees made by the receivers; of great dissatisfaction which finally arose among te employees affected; and finally the issuance of a writ of injunction by Judge Jenkins, on application of the receivers, restraining the employees "from combining and conspiring to quit, with or without notice, the service of the said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of the said railroad, and from so quitting the service of the said receivers with or without notice as to cripple the property or prevent or hinder the operation of the said

[163] Second session Fifty-third Congress, Journal, p. 137.
[164] Journal, p. 229; Record, pp. 2629, 2661.
[165] House Report No. 1049.

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railroad." his writ was followed by a second writ prohibiting the representatives of labor organizations from "ordering, recommending, approving, or advising others to quit the service of the receivers."

Although witnesses and the judge himself in an opinion denied that there was an intention to coerce the services of the employees, yet the majority of the committee find this explanation inconsistent with the words used, and hold that Judge Jenkins's writs were "not sustained either by reason or authority," were "in violation of a constitutional provision, an abuse of judicial power, and without authority of law." The report of the majority continues:

The testimony adduced before us fails to show any corrupt intent on the part of the judge.

The majority, in conclusion, recommend the adoption of this resolution—

Resolved, That the action of Judge James G. Jenkins in issuing said order of December 19, 1893, being an order and writ of injunction, at the instance of the receivers of the Northern Pacific Railroad Company, directed against the employees of said railroad company, and in effect forbidding the employees of said Northern Pacific Railroad Company from quitting its service under the limitations therein stated, and in issuing a similar order of December 22, 1893, in effect forbidding the officers of labor organizations with which said employees were affiliated from exercising the lawful functions of their office and position, was an oppressive exercise of the process of this court, an abuse of judicial power, and a wrongful restraint upon said employees and the officers of said labor organizations; and that said orders have no sanction in legal precedent, were an invasion of the rights of American citizens, and contrary to the genius and freedom of American institutions, and therefore deserving of the condemnation of the American people.

The minority views, signed by Messrs. William A. Stone, of Pennsylvania; George W. Ray, of New York; H. Henry Powers, of Vermont, and Thomas Updegraff, of Iowa, hold that if Judge Jenkins acted corruptly he should be impeached, while if he erred honestly the wrong would be righted by an appellate tribunal, and conclude:

To propose that a judge, who, as the majority declare, had no "corrupt intent" and "who sincerely believes" in his conclusions, shall, without impreachment, be censured by the legislative branch of the Government, is to confound all distinctions between the legislative and judicial powers and create a side tribunal of appeal where justice would be for sale to the suitor who could poll the largest vote.

It does not appear that the resolution was acted on by the House.

2520. The investigation into the conduct of Augustus J. Ricks, United States judge for the northern district of Ohio.

The House ordered an investigation of the conduct of Judge Ricks on the strength of charges preferred in a memorial.

In the investigation of Judge Ricks the respondent made a statement before the committee and offered testimony in his behalf.

The majority of the Judiciary Committee reported a resolution censuring Judge Ricks.

On January 7, 1895,[166] Mr. Tom L. Johnson, of Ohio, presented the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks, United States district judge for the northern district of Ohio. This memorial was referred under the rule.

[166] Third session Fifty-third Congress, Journal, pp. 50, 51; Record, p. 709.

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On the same day Mr. Johnson, by unanimous consent, offered the following resolution, which was agreed to without debate and without the reading of the memorial or any statement of its contents beyond the mere announcement by Mr. Johnson that it was "the memorial of Samuel J. Ritchie, praying for the impeachment of Augustus J. Ricks," etc.:

Resolved, That the Committee on the Judiciary be, and they are hereby, instructed to investigate the charges against the Hon. Augustus J. Ricks, United States district judge for the northern distict of Ohio, contained in the memorial of Samuel J. Ritchie, presented to the House this day, and report what action in their judgment should be taken thereon.

On January 25 [167] Mr. George P. Harrison, of Alabama, from the majority of the Committee on the Judiciary, submitted a report, accompanied by this resolution:

Resolved, That while the committee is not satisfied that Judge Augustus J. Ricks has been guilty of any wrong committed while judge that will justify it in reporting a resolution of impeachment, yet the committee can not too strongly censure the practice under which Judge Ricks made up his accounts.

Minority views were presented by Mr. Joseph W. Bailey, of Texas, accompanied by these resolutions:

Resolved, That Augustus J. Ricks, judge of the United States court of the northern district of Ohio, be impeached for high crimes and misdemeanors.

Resolved, That the Committee on the Judiciary is hereby instructed to prepare without unnecessary delay and report to this House suitable articles of impeachment against the said Augustus J. Ricks, judge of the United States court for the northern district of Ohio.

It appeared from the report and the minority views that at first the committee, by a vote of seven to six, had agreed to recommend impeachment, one member being present and not voting and three being absent. But before a report was made in accordance with this vote an order was agreed to inviting Judge Ricks to appear before the committee, and also providing for the testimony of such other witnesses as might be called. It was "after hearing the statement of Judge Ricks on his own behalf, and the testimony of Martin W. Sanders," that the committee, by a vote of nine to seven, one member being absent, agreed to the resolution reported by the majority.

It appears further from the report that the committee took testimony at Cleveland, Ohio, through a subcommittee, and in Washington before the whole committee. This testimony was such as was offered both against and in behalf of Judge Ricks.

The minority views were concurred in by Messrs. Joseph W. Bailey, of Texas; Edward Lane, of Illinois; Thomas R. Stockdale, of Mississippi; David A. De Armond, of Missouri; D. B. Culberson, of Texas; Thomas Updegraff, of Iowa, and C. J. Boatner, of Louisiana. The charges which they discussed were:

First. That as judge the said Augustus J. Ricks had defrauded the United States out of certain moneys, which he appropriated to his own use.

Second. That he corruptly persuaded Martin W. Sanders, his successor in the clerk's office, to omit from his emolument report fees which ought to have been included in it.

Third. That he approved the emolument report of said Martin W. Sanders, knowing it to be incorrect.

[167] Journal, p. 84; Record, p. 1860; House Report No. 1670.

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The minority found that the third charge was not reasonable, and that the second in the form made was not sustained by the evidence, although he had evidently taken fees to which he was not entitled. But on the first charge they concluded that the evidence sustained the guilt of the judge. The minority discuss at some length the evidence which led them to their conclusion.

The report was made near the close of the Congress, and it does not appear that any action was taken on it.

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Nature of Impeachment [1]

1. As to what are impeachable offenses. Sections 454–465.
2. General considerations. Section 466.

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

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

THE GENERAL NATURE OF IMPEACHMENTS.

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

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

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

* * * * * * *

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

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

"The delegation of important trusts affecting the higher interests of society is always from various causes liable to abuse. The fondness frequently felt for the inordinate extension of power, the influence of party and of prejudice, the seductions of foreign states, or the baser appetite for illegitimate emoluments are sometimes productions of what are not unaptly termed 'political offenses' (Federalist, No. 65), which it would be difficult to take cognizance of in the ordinary course of judicial proceeding.

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

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

"800. In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political

[1] Cannon's Precedents, vol. 6, p. 632 (1936).
[2] Third session Sixty-second Congress, record of trial, p. 1051.

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

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

On January 8, 1913,[3] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager John A. Sterling, of Illinois, said in final argument:

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

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

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

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

* * * * * * *

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

* * * * * * *

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

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"All civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

* * * * * * *

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

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

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

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

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

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

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

On January 9, 1913,[4] Mr. Alexander Simpson, of counsel for respondent, quoting the last statement in this address, said:

Sirs, if that be so, I want to know what has become of the Constitution in this case? Of what use was it to write into the Constitution that a man shall be impeached only for "treason, bribery, or other high crimes and misdemeanors" if there is no law to govern you, and if you may, out of your own consciences, evolve the thought that you will dismiss this respondent from the public service simply because you wish to get rid of him? You need no proof of "treason, bribery, or other high crimes and misdemeanors" to discharge him if that is the position you are to take in this case, for those words, under such circumstances, are unnecessary and meaningless.

[4] Record, p. 1269.

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I submit that that is not and can not be the true legal position. It must be precisely the reverse of that. You must find somewhere, whether it is under the "good behavior" clause of the Constitution, or whether it is under the article relating to impeachments themselves, that upon which you can lay your finger and say that this respondent has violated that thing, or you must under your oaths of office say that he shall go free.

And that is the position which Mr. Manager Sterling, speaking for the managers, asks you to take here. He asks you not to look to the law of the land for that which shall govern the rights of the parties here; but he asks you, out of your own conscience, whether your conscience agrees with mine or his or anybody's to evolve a law which shall apply to this case and which when this case is over shall cease ever thereafter to be the law. In this, as in everything else, the Constitution is only a frame of government. It remains for the Congress to vivify many of its provisions. It remains for Congress to write on the statute books what shall constitute "high crimes and misdemeanors," and there are already in the Revised Statutes many provisions upon that point.

On January 9, 1913,[5] Mr. A. S. Worthington, of counsel on behalf of the respondent, also referred to the position taken by Mr. Sterling in this address and said:

It has been insisted here by the managers on the part of the House of Representatives that the question of Judge Archbald's guilt or innocence is to be determined by what you individually consider to be an offense which justifies his removal from office; not that he has been brought here charged with anything of that kind, but having brought him here charged with certain specific offenses for which he and his counsel have prepared themselves and have summoned their witnesses he is now to be disgraced and forever branded as a criminal because you may find that he is not fit to be a judge.

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

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

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

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

The sixth amendment says:

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

Where is the man in this United States of America who would suggest that Judge Archbald could be required to answer without being informed of what is the accusation against him? Where is the man who would suggest that it is not necessary to confront him with the witnesses against him? Where is the man who would say he is not entitled to have subpoenas issued to bring his witnesses here to testify for him? Where is the person who will say that you could turn his

[5] Record, page 1282.

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counsel out of this Chamber and say he has to defend himself? Why? Because it is a criminal prosecution, and if it be not a criminal prosecution, then it is nothing known to the laws of this land.

On this subject Mr. Manager Edwin Yates Webb, of North Carolina, said by way of rebuttal:[6]

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

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

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

I wish to quote authority in opposition to this position.

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

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

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

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

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

On January 25, 1923,[7] Mr. R. Y. Thomas, jr., of Kentucky, from the Committee on the Judiciary, submitted the following minority views to accompany the report of that committee on the investigation into the conduct of Attorney General Harry M. Daugherty:

It was strongly intimated if not directly contended by several members of the committee that the Attorney General could not be impeached except for an indictable offense. I think this view is absolutely incorrect. Impeachment is an extraordinary remedy born in the parliamentary procedure of England, and the principles which govern it have long been enveloped in clouds of uncertainty. The practice of impeachment began in the reign of Edward the Third of England, and statutes for prosecutions for offenses of this character were first enacted in the reign of Henry the Fourth.

By usage of the English Parliament so far back that the memory of man runneth not to the contrary, offenses were impeachable which were not indictable or punishable as crimes at common law. Therefore, the phrase "high crimes and

[6] Record, p. 1215.
[7] Forth session Sixty-seventh Congress, House Report No. 1372.

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misdemeanors" must be as broad and extended as the offense against which the process of impeachment affords protection. Every case of impeachment must stand alone, and while certain general principles control the judgment and conscience, the Senate alone must determine the issue.

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

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

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

On January 13, 1914,[8] on motinn of Mr. Elihu Root, of New York, a monograph by Wrisley Brown, of counsel on behalf of the managers in the impeachment trial of Judge Robert W. Archbald, was printed as a public document. The following is an excerpt:

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegation of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much persuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article four charged open and notorious drunkeness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged secessionary speeches of the respondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But, it will be observed, none of the articles exhibited against Judge Archbald charged an indictable offense, or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive, and it will go down in the annals of the Congress as a great landmark of the law.

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

On January 8, 1913,[9] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, said in final argument:

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

[8] Second session Sixty-third Congress, Senate Document No. 358, p. 16.
[9] Third session Sixty-second Congress, Record, p. 1218.

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

"The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defense could be sustained one could by resignation avoid an investigation into his conduct by a court of impeachment, and if he was of the same political faith as the head of the executive department and in sympathy with it, he could be transferred from one office to another and thus avoid impeachment altogether. The effect of such defense would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention that the change of office does not affect the power of impeachment. He is now exercising the same powers that he exercised when he was an associate justice. He is performing the same duties; he is practically filling the same office."

Mr. Foster, on this subject, says:

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

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

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

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

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

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

This arrangement could be preserved in earlier times when population was sparse and business intercourse small and human affairs were not intricate; but as civilization became more complex, and the division of labor in administering judicial affairs became more urgent, the right to decide and pass upon various questions was allotted to different officers, and so to-day we have a judicial system in which all judicial power is lodged, but distributed to different courts, but in all this evolution and distribution of judicial power there is one great right which the people have always reserved unto themselves, and that is the right to supervise the conduct of public officials and, through their representatives, to remove such officials from office for misconduct or misbehavior, and so, Senators, you sit to-day, theoretically at least, as the court of 90,000,000 people who have commanded us through the popular branch of Congress to bring this respondent before you to inquire into his conduct, and ascertain if the condition on which he was appointed to the high office which he now holds has not been broken by him.

Quoting Foster again:

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

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

In reply, Mr. Alexander Simpson, jr., counsel for respondent, in his concluding argument on January 9 [10] said:

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

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

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

That argument necessarily concedes the points decided in the Blount case and considered and voted upon in the Belknap case, that he who is out of office can no longer be impeached. It necessarily also concedes that the constitutional provision has for its primary purpose the removal of the delinquent from the particular office in which he is said to have done a wrong. That is the necessary conclusion from the provision of Article I, section 3, of the Constitution, which provides what shall be the penalty in case of impeachment. It is considered also by Judge Story in his work on the Constitution, and if the argument which was presented by Judge Story is sound it must necessarily follow that the similarity of the two offices is not and can not be of any moment whatsoever. Can it be said that if a civil officer, say in the Cabinet of the President, is transferred from one portfolio to the other and continues steadily in office, that he may be impeached while holding the second office for that which was done in the first, and yet if he passes from the Cabinet to the Senate or into private life he can not be impeached at all? There is no logic or sound reasoning in any such proposition as that, nor is it in accord with any well-settled principles. In the provision which the managers quote in their brief from Mr. Foster he says this is regard to that:

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

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

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

[10] Record, p. 1278.

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On January 3, 1913,[11] Messrs. R. W. Archbald, jr., M. J. Martin, Alexander Simpson, jr., and A. S. Worthington, of counsel for the respondent, offered a brief covering various phases of the case, from which the following extract relates to this question:

III.

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

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

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

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

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

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

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

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

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

"That this honorable court ought not to have or take further cognizance of the said articles of impeachment * * * because he says that before and at the time when the said House of Representatives ordered and directed that he, the said Belknap, should be impeached at the bar of the Senate, and at the time when the said articles of impeachment were exhibited and presented against him * * * he, the said Belknap, was not, nor hath he since been, nor is he now, an officer of the United States; but at the said time was, ever since hath been, and now is, a private citizen of the United States and of the State of Iowa. (3 Hinds' Precedents, 919.)"

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

After much discussion the Senate determined to hear first the question of the sufficiency of the replication. After a long debate, it was decided, by a vote of 37 to 29, that Belknap was amenable to trial by impeachment for acts done as Sec-

[11] Record of trial, p. 1067.

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retary of War, notwithstanding his resignation before he was impeached. (3 Hinds' Precedents, 964.)

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

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

Hence, in Belknap's case, as in Blount's case, it will be seen that the final vote does not indicate that any of the Senators who voted "guilty" did so on the ground that one who has been a civil officer remains liable to impeachment as long as he lives, for acts done during the time he held the office. The evidence in the case showed that Belknap was advised at 10 o'clock of the morning of the day that he resigned, that the Judiciary Committee of the House was about to report a resolution recommending his impeachment. He hurried to the President, tendered his resignation, and had it accepted, a few hours only before the Judiciary Committee did present to the House the resolution recommending his impeachment. There was much controversy in the discussion of the case before the Senate by the managers and counsel, respectively, as to whether Belknap was an officer when the resolution of impeachment was presented to the House, on the theory that the law takes no notice of fractions of a day. But, aside from this, it was strenuously contended by the managers that even if the general rule be that an officer ceases to be subject to impeachment when he leaves the office, there should be an exception to that rule when the officer resigns for the very purpose of escaping impeachment.

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

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

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

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

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

And so of any other public man who has never held office under the United States.

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

459. On January 9, 1913,[12] in the Senate sitting for the Archbald impeachment trial, Mr. Manager George W. Norris, of Nebraska, said in concluding argument:

The authorities are practically unanimous that a public official can be impeached for official misconduct occurring while he held a prior office if the duties

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

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

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

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

On January 9, 1913,[13] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Paul Howland of Ohio, in final argument said:

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

The learned counsel for the respondent, by insisting that only indictable offenses are impeachable, would seem to be placing himself in the position of holding that the object of impeachment was punishment to the individual. This conception of the object of impeachment is entirely erroneous, and whatever injury may result to the individual is purely incidental and not one of the objects of impeachment in any sense. An impeachment proceeding is the exercise of a power which the people delegated to their representatives to protect them from injury at the hands of their own servants and to purify the public service. The sole object of impeachment is to relieve the people in the future, either from the improper discharge of official functions or from the discharge of official functions by an improper person. This view of impeachment is clearly demonstrated by the judgment which the Constitution authorizes in case of conviction and which shall extend no further than removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the Government of the United States, leaving the punishment of the individual for any crime he may have committed to the criminal court. (See Art. I, sec. 3, par. 7, Constitution of the United States.)

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

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

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

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

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

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

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

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

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

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

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

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

If it should be objected that the legal status of the judicial tenure must be placed on a higher ground than an ordinary contract right by reason of the solemnities necessary to create the status and by reason of the important and sacred functions of government with which the judge is charged, we perhaps would be justified in saying that a fiduciary relation of the highest and most sacred character known to the law is created by the commission of appointment and the oath of acceptance of a Federal judge. Under this conception of the status of the judicial tenure the judge is acting as a trustee. The subject matter of the trust is the judicial power of the United States, and the beneficiaries of the trust are the people thereof. Given this status in a court of equity, the trustee, under well-known and well-recognized principles of equitable jurisprudence, can always be removed on application of the beneficiary and a showing that the trustee is not performing his duties as such trustee in such a manner as to satisfy the conscience of the chancellor that he is acting for the best interest of the beneficiary. Realizing, however, the manifest impropriety of leaving the question of forfeiting the judicial tenure to the judges, the framers of the Constitution wisely provided a different forum, viz, the Congress, to raise and try the question of the forfeiture. We have now seen that whether we apply principles of law or equity to the status created by the appointment of the Federal judge there would be a forum to adjudicate the rights of the parties, and reasoning by analogy we are driven to the conclusion that the framers of the Constitution

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were not unmindful of the importance of the subject with which they were dealing, and intended to and did provide a forum before which the people of the United States could bring their judges and on proper showing of misbehavior, which demonstrates the unfitness of the judge to continue in office, work a forfeiture of the judicial tenure.

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

On January 9, 1913,[14] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager Paul Howland, of Ohio, filed as part of his final argument a record of impeachment trials in various States, with particular reference to their holdings on the question as to whether an offense in order to be impeachable must be indictable. The summary appears in full in the Congressional Record of that date.

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

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

On January 9, 1913,[15] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, Mr. Manager Paul Howland, of Ohio, in final argument said:

In the removal section of the Constitution we find the words "high crimes and misdemeanors." These words are used in the same sense that had attached to them for centuries in the impeachment trials of England. They were used as part of the well-recognized terminology of the law of Parliament as distinguished from the common law. We must bear in mind that these terms are used in a section of the Constitution which is plainly intended to protect the State against its own servants.

The two enumerated offenses of treason and bribery are offenses peculiarly against the state as distinguished from offenses against the individual. In construing a clause of this character in the Constitution, where the whole object is to protect and preserve the Government, such a construction should be placed upon the language used as will best accomplish the results desired. To insist that the technical definition of the criminal law should be applied in construing the meaning of the term "high crimes and misdemeanors" is to insist on the narrowest possible construction, and loses sight of the object and purpose of this clause in the Constitution. To insist that it is impossible to impeach a judge unless he has committed some indictable offense is to say that the people of this country are powerless to remove a Federal judge so long as he is able to keep out of jail. Whhile no criminal is fit to exercise the judicial function, it does not follow that all other persons are fit to be judges. Such a construction is absolutely repulsive to reason and ought not to be and is not a correct interpretation of the term "high crimes and misdemeanors."

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

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

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

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

[14] Third session Sixty-second Congress, Record, p. 1261.
[15] Third session Sixty-second Congress, Record, p. 1260.

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

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

Under the State constitutions we sometimes find the added terms "mal and corrupt conduct," "corruption in office," and "maladministration"—all general terms without attempting any technical definition. The reason for this is perfectly obvious, and is that the subject matter is not capable of technical definition. Who is wise enough to anticipate every manifestation of fraud that would give a chancellor jurisdiction and write it into a statute? It is the effect of acts under the circumstances of each particular case that confers jurisdiction. So it is with impeachment. No one can tell in advance in what way or from what source the danger may arise which demands the exercise of this power. The power of impeachment is recognized and authorized in every one of our constitutions, Federal and State, but the circumstances which warrant the exercise of that power are not defined and the necessity for its exercise is in the first instance left to the discretion of the House of Representatives. It is an indefinite and broadpower incident to sovereignty, and its exercise in this country is demanded whenever the agents of sovereignty have acted in such a manner as to destroy their efficiency in the discharge of their duties to the sovereign. The existence of this power is necessary to the permanence of the State, and the exercise of the power is necessary whenever and however the welfare of the State may be threatened by its civil officers.

Mr. Alexander Simpson, counsel for respondent, took issue with this argument, saying: [16]

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

But what are you going to do if the matter is to be considered solely under the language of the Constitution itself? The word "misdemeanors' 'in that clause must be taken either in the technical sense or in the proper sense. If that word is taken in the technical sense everybody knows that a misdemeanor taken technically is a crime pure and simple. If it is taken in the popular sense, then, notwithstanding what some text writers have said, I venture the assertion that if you go out into the cars or on the streets or in your homes and ask the people you meet what is meant by the words "treason, bribery, or other high crimes and misdemeanors," you will not find one in a thousand but will say that every one of those words imports a crime. If that is so, then necessarily, when you come to construe those words after this trial is over, you will necessarily have to reach the conclusion that these charges must be indictable or they can not be impeachable.

463. On January 9, 1914,[17] in the Senate, sitting for the Archbald impeachment trial, Mr. Manager John W. Davis, of West Virginia, said in final argument:

[16] Record, p. 1270.
[17] Third session Sixty-second Congress, Record, p. 1266.

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

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

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

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

it will read that—

"the judges both of the Supreme and inferior courts shall hold their offices so long as they are guilty of no indictable crime."

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

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

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

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

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

"The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will

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be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."

Mr. Davis then cited numerous authorities and said:

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

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

After citing authorities, Mr. Davis continued:

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

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

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

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

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

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

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

If the phrase "criminal in nature" means those things which might be made crimes by legislative prohibition, every act here charged against this respondent comes within the description. Certainly Congress could by express criminal statute forbid a Federal judge to accept gifts of money from members of his bar, to communicate in private either orally or by letter with counsel in reference

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to cases pending for decision, to request financial favors from parties litigant before him, and as to the Commerce Court might well forbid the members of that court to engage in the business of hunting bargains from railroad companies engaged in interstate commerce. And certainly if such things are not already misdemeanors or misconduct or misbehavior, a statute to forbid them can not come too soon.

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

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

On January 9, 1913,[18] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager George W. Norris, of Nebraska, in the final argument said:

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

The Constitution provides (Art. I, sec. 2) that the House of Representatives shall have the sole power of impeachment, and in section 3 of the same article it is provided that the Senate shall have the sole power to try all impeachments. It is undisputed, and, indeed, has never been questioned, that to remove a United States judge from office two things are essential: First, he must be impeached by the House of Representatives, and, second, he must be tried and convicted by the Senate upon the articles of impeachment presented by the House. There is no other way provided by the Constitution of the United States for the removal from office of a judge. In the consideration of this subject, I shall draw a distinction between a judge of the United States court and all other civil officers of the United States. I shall demonstrate from the Constitution itself that a judge of the United States court can properly be impeached, convicted, and removed from office for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect, or disrepute. Section 4 of Article II of the Constitution reads as follows:

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

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

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

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

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

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

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

While I believe the construction placed on "misdemeanors" by the respondent is wrong, yet they have not made a defense to the various charges of misbehavior in office, even if we accept their construction of the law that misdemeanors in this section means only indictable offenses. If, for instance, the President was expressly excluded from the officers named in this section, then I concede there would be no way under the Constitution for him to be impeached, tried, and removed from office, because there is no other provision of the Constitution that provides for any offense on the part of the President or limits his tenure of office, excepting the expiration of his regular term. But if judges were expressly eliminated from this section, and it read, "all civil officers of the United States except judges, etc.," it would not follow that they could not be impeached, convicted of misbehavior, and removed from office, because section 1, Article III, expressly provides that they shall only hold their offices during good behavior. In other words, our forefathers in framing the Constitution have wisely seen fit to provide for a requisite of holding office on the part of a judge that does not apply to other civil officers. The reason for this is apparent. The President, Vice President, and other civil officers, except judges, hold their positions for a definite, fixed term, and any misbehavior in office on the part of any of them can be rectified by the people or the appointing power when the term of office expires. But the judge has no such tenure of office. He is placed beyond the power of the people or the appointing power and is, therefore, subject only to removal for misbehavior. Since he can not be removed unless he be impeached by the House of Representatives, tried and convicted by the Senate, it must necessarily follow that misbehavior in office is an impeachable offense.

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

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If I am not right in my construction of the Constitution, then the Congress and the country are absolutely helpless in any attempt to get relief from a judge who drags the judicial ermine down into disgrace, but is careful in doing so not to commit any criminal offense. If I am not right in my construction, then that provision of the Constitution which says that judges shall hold office during good behavior is absolutely nullified, and as far as the good behavior part of it is concerned it has no vitality, no life, no effect. The judge who secretly arranges with attorneys on one side of a case to make a private argument—who not only makes such arrangement, but who initiates it—is guilty of a misbehavior. Every lawyer knows this; every Senator will admit it. Are we helpless in the premises simply because such an act is not indictable under the law? The judge who is continually asking favors of litigants in his court, if he is careful, can not be convicted of any crime, but he is guilty of a misbehavior. No one will dispute. He is perverting the ends of justice. He is bringing the judiciary into disgrace and into disrepute. Carried to its logical conclusion, such conduct would soon mean that our judicial system would fall. It could not survive. Are we helpless? Must we say that, although the Constitution says the judge shall only hold his office during good behavior, the House of Representatives and the Senate are unable to apply those provisions of the Constitution which provide for impeachment, trial, and removal? If our forefathers meant anything when they provided in the Constitution that the judges should hold their offices during good behavior, they certainly intended that when the judge misbehaved he should be removed from office. Such a construction of the Constitution will not violate any principle of law, but, on the other hand, it will give full effect to a constitutional provision that would otherwise be meaningless and a dead letter. Our forefathers wisely, I think, refrained in the Constitution from giving any definition to "crimes and misdemeanors," and likewise refrained from defining what would be an abuse or a violation of "good behavior." Misbehavior, the opposite of good behavior, and I think the proper appellation of any conduct that is not good behavior, implies innumerable offenses of greater or less magnitude.

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

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

On January 8, 1913,[19] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Edwin Yates Webb, of North Carolina, in final argument said:

If the Constitution, Article III, section 1, means anything, then we want to bring it before the Senate to-day and ask Senators to say what it does mean when it provides that judges of the Supreme Court and inferior courts shall hold their offices "during good behavior."

The provision in Article II of the Constitution, section 4, Mr. President, refers to impeachment of the President, Vice President, and other civil officers for treason, bribery, or other high crimes and misdemeanors; but later on in that

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

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same great instrument, after Article II had been adopted, the constitutional fathers say the judges of the United States shall hold their offices "during good behavior."

It has been pointed out by many constitutional writers, and you yourselves see, that the people have no way of getting rid of a judge who has violated this provision by misbehavior except it is done by this great body. What does "during good behavior" mean?

The Century Dictionary says:

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

Mr. Foster in his work on the Constitution (p. 586) makes this statement:

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

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

Says Elliott in his Debates on the Constitution:

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

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

But, mark you, the object then was to remove for bad behavior, but to give them a trial, as the Senate is doing in this particular case.

Judge Lawrence, in the Johnson impeachment case (p. 643), says:

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

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

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

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

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

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

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

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

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

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

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

In reply to this argument, Mr. Alexander Simpson, counsel for respondent, said:[20]

Now, I want to know what good behavior means. This is the provision:

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

If you take that whole clause and consider it, either historically or grammatically, you will find that the words "good behavior" relate to good behavior in office. The compensation which is to be paid is for service in the office. The good behavior which is the tenure is to be good behavior in the office. But, say the managers, it is not good behavior in office which is the test at all, and you may impeach and remove a man even though he has behaved perfectly well in his office. Personally I agree with that; I am not challenging that position, but it answers their proposition now being considered that good behavior in office is the tenure by which the respondent holds, and for a breach of that he may be removed from office without considering the impeachment clause of the Constitution.

I do not think that the good-behavior clause has anything whatever to do with the impeachment. Everybody knows how the good-behavior clause came into being. In the ancient days the judges, like all other civil officers, held their positions at the pleasure of the King. Then the barons wrested from the King his power of dismissal and required that there should be a good-behavior tenure rather than a tenure at the pleasure of the King, subject at that time only to the power of impeachment. And then, a little later—I think it was in 1701, after the Revolution—there was added the removal power; so that, upon address, judges might be removed the same as upon impeachment without a trial. Those are the circumstances under which the good-behavior tenure came into existence.

But what does "good behavior" mean if you are going to take that alone into consideration? A man ill behaves if he speaks unduly cross to his wife and children. May he be removed from office because of that? If he is the happy owner of an automobile he may violate the speed laws and be hailed before some magistrate and fined. Is he to be removed from office because of that? No one would answer "yes" to either of those questions, and hence you must get down to something definite, something upon which you can lay your finger and say, "There is the definite thing which this man should have known, and as he should have known it and has chosen to violate it he must pay the penalty of his violation." That definite thing can be ascertained only by reference to the clause which says that he may be impeached for "treason, bribery, or other high crimes and misdemeanors." In the ordinary sense of the term one can understand how a man can be of perfectly good behavior in everything else and still be guilty of treason, but does anybody doubt but that he could be removed from office if he was guilty of treason? In truth, you have to go back from the good-behavior clause to the impeachment clause to find out what are the causes for an impeachment. It is the impeachment clause which is the controlling clause and not the good-behavior clause at all.

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

On January 3, 1913,[21] Mr. Manager Henry D. Clayton, of Alabama, presented a brief on behalf of the House of Representatives, covering this question, among others, as follows:

[20] Record, p. 1270.
[21] Record, of trial, p. 1051.

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THE TENURE OF FEDERAL LIMITED TO "DURING GOOD BEHAVIOR"

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

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

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

On January 3, 1913,[22] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Manager Henry D. Clayton, of Alabama, filed, on behalf of the House of Representatives, a brief, in which the following appears:

IMPEACHMENT TRIALS IN THE UNITED STATES SENATE

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

IMPEACHMENT OF WILLIAM BLOUNT

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

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

IMPEACHMENT OF JOHN PICKERING

John Pickering, judge of the United States District Court for the District of New Hampshire, was impeached in 1803, on the ground that he had disobeyed the law in the course of proceedings brought by the United States to condemn a ship with its cargo for a violation of the customs laws, in that the judge delivered the ship to the claimant after its attachment by the marshall without requiring a bond, in accordance with the requirements of law; that in such proceedings he had refused to hear the testimony offered in behalf of the United States; that he had refused to grant an appeal by the Government from his arbi-

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

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

IMPEACHMENT OF SAMUEL CHASE

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

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

IMPEACHMENT OF JAMES H. PECK

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

IMPEACHMENT OF WEST H. HUMPHREYS.

In 1862 West H. Humphreys, judge of the United States District Court for the District of Tennessee, was impeached for making a public speech declaring the right of secession and inciting revolt and rebellion against the Government of the United States; with the support and advocacy of the ordinance of secession; with aiding in the organization of an armed rebellion against the United States; with conspiring to oppose the authority of the Government of the United States by force; with refusing to hold his court or perform its functions; and with unlawfully acting as judge of the Confederate district court in causing arrests, imprisonments, and confiscations. The respondent made no appearance, and the trial proceeded in his absence. The respondent was convicted on all the charges, with the exception of the unlawful arrests and confiscations, and was removed and disqualified from holding office.

IMPEACHMENT OF ANDREW JOHNSON.

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

IMPEACHMENT OF WILLIAM W. BELKNAP.

In 1876 William W. Belknap, Secretary of War, was impeached on five articles, charging that he had accepted a portion of the profits of an Army post tradership from a post trader whom he had appointed while he held the War portfolio. A few hours before the House formally adopted the articles of impeachment against him, Belknap resigned as Secretary of War and the President accepted

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his resignation. His counsel interposed a plea to the jurisdiction in the Senate on the ground that the respondent was not a civil officer of the United States at the time of his impeachment. This plea was overruled by a majority of less than two-thirds and the trial proceeded. The respondent was ultimately acquitted by the votes of the Senators who had originally voted in favor of the plea to the jurisdiction.

IMPEACHMENT OF CHARLES SWAYNE.

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

A trial was had and the respondent was ultimately acquitted.

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Function of the House in Impeachment [1]

1. The managers. Section 467.
2. High privilege of questions relating to impeachment. Sections 468–470.

467. A summary of impeachment proceedings resulting in trial, with reference to methods of their institution, and the number and manner of appointment of managers on the part of the House.

An examination of the comparatively few impeachment cases which have resulted in trial shows a wide variance in the manner in which preliminary investigations in the House have originated and in the method of selecting managers on the part of the House to conduct impeachment in the Senate.

The case of Senator William Blount, of Tennessee [2] the first in the history of the Congress to reach trial, had its inception in a confidential letter from the President to the House.

The eleven managers selected by the House were elected by ballot. All were, of course, members of the Federalist Party.

In this, and in the two cases following, procedure was through special committees, as the Judiciary Committee did not come into existence as a standing committee until 1813.

The case of Judge Pickering [3] originated in response to a special message from the President, to which were affixed certain ex parte affidavits.

The special committee to which the message was referred having reported in favor of impeachment, and the report being agreed to by the House, eleven managers were elected by ballot, all of whom were from those voting for impeachment, seven being members of the majority party of the House and one of the minority party. The party affiliations of the remaining three are not of record.

Action against Judge Chase [4] was begun as the result of a formal statement in the House by Mr. John Smilie, of Pennsylvania, who incorporated in his remarks a statement made by Mr. John Randolph, of Virginia, criticizing the official conduct of Judge Chase.

Two members of the select committee chosen to inquire into the charges were chosen from those opposing the investigation, but all of the seven managers, elected by the House by ballot had voted both for the investigation and in favor of impeachment. Four of them were members of the majority party.

[1] Cannon's Precedents, vol. 6, p. 657 (1936).
[2] Hinds' Precedents, sections 2294–2318.
[3] Hinds' Precedents, sections 2319–2341.
[4] Hinds' Precedents, sections 2342–2363.

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The case of Judge Peck [5] originated as the result of a memorial by an individual, which was referred to the Committee on the Judiciary and was by that committee reported to the House with a recommendation in favor of impeachment.

Five managers were selected by ballot, three of whom served on the Judiciary Committee, three belonging to the majority party of the House and two to the minority.

In the case of Judge Humphreys [6] the Committee on the Judiciary, as the result of an investigation authorized by resolution, reported recommending impeachment.

Five managers were appointed by the Speaker, three from the Judiciary Committee and four representing the majority party of the House.

The first attempt to impeach President Andrew Johnson [7] was initiated by Mr. James Ashley, of Ohio, who rose in the House and impeached the President, submitting specific charges, which were by resolution referred to the Committee on the Judiciary for investigation.

Congress having adjourned without action on the subject, a second proceeding looking to impeachment was begun in the succeeding Congress and referred to what was known as the Committee on Reconstruction, which recommended impeachment.

Under authority conferred by resolution, the Speaker appointed seven managers, two of whom were members of the Committee on the Judiciary and six of whom were members of the majority party of the House.

The impeachment of Secretary of War William W. Belknap [8] resulted from an investigation by a select committee appointed to look into the affairs of the Government in general. On report of this committee, the Committee on the Judiciary was instructed to draw up articles of impeachment.

Seven managers were appointed by the Speaker, three of whom were from the Committee on the Judiciary and five of whom belonged to the majority party in the House.

Mr. William Lamar, of Florida,[9] rising in his place, impeached Judge Swayne, making specific charges, which were referred to the Committee on the Judiciary. The Judiciary Committee reported in favor of impeachment and, by resolution, a select committee was appointed to draw up articles of impeachment. This was in keeping with the procedure in each previous impeachment case, with the exception of that of Secretary Belknap, where, as in the case of Judge Archbald, following, the investigating committee reported the articles of impeachment.

Seven managers to conduct the impeachment of Judge Swayne were appointed by the Speaker, five of whom were members of the Committee on the Judiciary and four of whom were from the majority party of the House.

The original charges against Judge Archbald [10] were filed by a commissioner of the Interstate Commerce Commission in a letter to the

[5] Hinds' Precedents, sections 2364–2384.
[6] Hinds' Precedents, sections 2385–2397.
[7] Hinds' Precedents, sections 2408–2443.
[8] Hinds' Precedents, sections 2444–2468.
[9] Hinds' Precedents, sections 2469–2485.
[10] Hinds' Precedents, sections 7727–7741.

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President. Later, in the House, Mr. George W. Norris, of Nebraska, introduced a resolution asking that the President transmit this letter to the House. The letter having been messaged to the House by the President, was referred to the Committee on the Judiciary, which, after investigation, recommended impeachment.

Seven Members were named by resolution to act as managers, all of them members of the Committee on the Judiciary, the only instance in the history of impeachment proceedings in which all managers were selected from one committee. Four of the managers belonged to the majority party of the House.

In most of the cases cited a select committee was appointed by the Speaker to take the case of impeachment to the bar of the Senate. The function of this committee was simply to report to the Senate the fact that an impeachment had been voted in the House and to report back to the House that they had so reported to the Senate.

In some cases the Speaker appointed a select committee to draw up the articles of impeachment, the work of the committee being completed when the articles so draw had been adopted by the House.

It is to be noted that managers have been selected in three ways:

(*a*) By resolution authorizing the Speaker to appoint managers and naming the number thereof;

(*b*) By resolution naming both the number and the personnel of the committee;

(*c*) By election by ballot.

In case of election by ballot a majority vote has been necessary to the selection of each of the seven managers.

Where six received a majority vote and the seventh (although the next highest) failed to receive a majority vote another ballot on the seventh manager was taken.

468. A proposition to impeach a civil officer of the United States is presented as a question of constitutional privilege.

The inquiry into the conduct of H. Snowden Marshall, United States district attorney for the southern district of New York.

An instance in which a Member after submitting articles of impeachment which were referred to a committee of the House, later submitted amended articles of impeachment which were referred to the same committee.

The incorporation of unprivileged matter in a resolution proposing impeachment destroys its privilege.

A resolution directly proposing impeachment is privileged but the same is not true of one proposing investigation with a view to impeachment.

A Member submitting a privileged resolution proposing impeachment is entitled to recognition for one hour in which to debate it.

A Member recognized to present a privileged resolution may not be taken from the floor by a motion to refer.

On December 14, 1915,[11] Mr. Frank Buchanan, of Illinois, submitted as a privileged subject the following:

Mr. Speaker, by virtue of the power conferred on me by the Constitution of the United States as a Member of this House, and to the end that justice may be restored in the administration of the office of United States district attorney for the southern district of New York, I impeach H. Snowden Marshall, United States

[11] First session Sixty-fourth Congress, Record, p. 240.

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district attorney for the southern district of New York, for the following specific offenses:

1. He has corruptly neglected and refused to prosecute gross and notorious violations of law by the most powerful and dangerous criminal trusts and monopolies in the United States within his said judicial district.

2. He has prostituted the great office intrusted to him by the people to the service of the great criminal trusts.

3. He has used the powers of his said office for the purpose of publicly defaming, slandering, and libeling the good name of peaceful and law-abiding citizens of the United States, to their great injury.

4. He has violated persistently the eight-hour laws of the United States and of the State of New York.

5. He has corruptly neglected and refused to prosecute men who have made the port of New York within his said district a naval base for foreign belligerent powers.

6. He has corruptly neglected and refused to prosecute violators of the Federal statutes prohibiting the loading and shipment of explosives on ships carrying passengers.

And for other high crimes and misdemeanors.

On motion of Mr. Buchanan, of Illinois, the charges were referred to the Committee on the Judiciary.

On January 11, 1916,[12] Mr. Buchanan again asked recognition for a question of privilege and said:

I rise to offer a resolution amending my impeachment charges against H. Snowden Marshall, and I desire to send the following resolution to the Clerk's desk, to be read.

The Clerk read as follows:

Whereas on the 14th day of December, 1915, certain charges of impeachment were presented in this House by me against the United States district attorney for the southern district of New York, H. Snowden Marshall; and

Whereas said charges were not accompanied by a resolution empowering the Judiciary Committee sufficiently:

Therefore I present the following amended impeachment charges contained in the resolution which I am now offering:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the alleged official misconduct of H. Snowden Marshall, United States attorney for the southern district of New York.

The resolution here details at length specific items, and concludes:

And in making this investigation, the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign, and the Clerk to attest, subpœnas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House.

Mr. James R. Mann, of Illinois, made the point of order that the resolution was not privileged, in that it included a provision for the payment of expenses from the contingent fund of the House, and said:

To begin with, it provides for the payment of the expenses out of the contingent fund of the House, and under the rules no resolution providing for that is privileged unless it is reported from the Committee on Accounts.

[12] Record, p. 913.

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That is far enough; but my colleague from Illinois has impeached this official and the House had referred that matter to the Committee on the Judiciary. Now he presents a resolution, not of impeachment, but a resolution authorizing a committee to make an investigation, which of itself is not a privileged matter.

The privileged matter is the impeachment. That is not concerned in this case. The Speaker could very readily see that if to-day I can impeach a judge or other official of the United States and have it referred to the Committee on the Judiciary and immediately thereafter present a resolution providing for an investigation, and that is privileged, then I am entitled to have an hour in the House in the discussion of that, and if that be voted down I can present another resolution, if it be privileged, in a little different form, and take another hour in the House, and if that be laid upon the table or something else be done with it, then I present another resolution along the same lines, and so on ad infinitum.

Now, the privilege is the presenting of the impeachment. A Member on his responsibility in the House impeaches an official of the Federal Government. That is a matter of high privilege. But when the House has disposed of that it is not a privileged matter to present another resolution referring to an investigation of that subject.

The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution and immediately reoffered it with the provision for expenses omitted.

Mr. Mann made the point of order that the resolution proposed an investigation with view to impeachment rather than impeachment as such, and was therefore without privilege. The Speaker sustained the point of order, and Mr. Buchanan withdrew the resolution.

Finally, on January 12 [13] Mr. Buchanan again presented a resolution similar in form to that last offered omitting the preamble, and moved its adoption.

Mr. John J. Fitzgerald, of New York, interrupting at the conclusion of the reading of the resolution, moved that it be referred to the Committee on the Judiciary. Mr. Buchanan made the point of order that he had not yielded the floor.

The Speaker held that Mr. Buchanan was entitled to the floor for one hour to debate the resolution, at the conclusion of which Mr. Fitzgerald might move to commit, and recognized Mr. Buchanan.

After debate, on motion of Mr. Fitzgerald, the resolution was referred to the Committee on the Judiciary, yeas 133, noes 712.[14]

469. A proposition to impeach civil officers of the United States presents a question of high constitutional privilege.

The investigation of the Federal Reserve Board in 1917.

An arraignment of impeachment may interrupt the reading of the Journal or business proceeding under a unanimous consent agreement.

An instance in which a Member proposed impeachment individually and collectively against members of an official board.

Articles of impeachment were referred by the House to the Committee on the Judiciary.

In the absence of evidence to support charges the House declined to institute impeachment proceedings.

A member having submitted articles of impeachment, it was held that his privilege had expired.

On February 12, 1917,[15] Mr. Charles A. Lindbergh, of Minnesota, rising to a matter of privilege, said:

[13] Record, p. 962.

[14] For further proceedings in this case see sections 7747–7751.

[15] Second session Sixty-fourth Congress, Record, p. 3117.

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Mr. Speaker, I rise to a point of the highest privilege to prefer impeachment proceedings.

Mr. James R. Mann, of Illinois, inquired if pending business under a unanimous consent agreement could be interrupted by the proposed matter of privilege.

The Speaker [16] said:

The gentleman can interrupt the reading of the Journal with a question of that kind. A question of the highest privilege takes precedence over everything.

Subsequently [17] Mr. Lindbergh, as a privileged subject, submitted the following:

Mr. Speaker and the House of Representatives, I, Charles A. Lindbergh, the undersigned, upon my responsibility as a Member of the House of Representatives, do hereby impeach W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delno, Adolph C. Miller, and Charles S. Hamlin, members, each individually as a member of the Federal Reserve Board, and also all of them collectively as the five active working members of said board, of high crimes and misdemeanors.

I, upon my responsibility as a Member of the House of Representatives, do hereby impeach the said W. P. G. Harding, governor; Paul M. Warburg, vice governor; and Frederick A. Delano, Adoph C. Miller, and Charles S. Hamlin, members, and each of them as members of the Federal Reserve Board, and also impeach all of them collectively as the five active working members of the Federal Reserve Board, of high crimes and misdemeanors in aiding, abetting, and conspiring with certain persons and firms hereinafter named, and with other persons and firms, known and unknown, in a conspiracy to violate the Constitution and the laws of the United States and the just and equitable policies of the Government, which said conspiracy developed and grew out of and was consummated from the following facts and acts, to wit:

Mr. Lindbergh then presented in detail fourteen charges upon which the arraignment was based. At the conclusion of the arraignment Mr. Lindbergh inquired if his privilege ceased with the presentation of charges. The Speaker replied that it did. Thereupon, on motion of Mr. Claude Kitchin, of North Carolina, the articles of impeachment were referred to the Committee on the Judiciary.

On March 3,[18] Mr. Edwin Yates Webb, of North Carolina, from the committee, submitted a report recommending that no further proceedings be had in the matter. The report was adopted by the House without debate.

470. Questions relating to impeachment while of high privilege must be submitted in the form of a resolution to entitle the proponent to recognition for debate.—On January 18, 1933,[19] Mr. Louis T. McFadden, of Pennsylvania, announced that he rose to a question of constitutional privilege relating to impeachment proceedings, and asked recognition for one hour.

Mr. Robert Luce, of Massachusetts, made the point of order that recognition to raise a question of constitutional privilege could not be granted unless preceded by a resolution or motion in writing.

The Speaker [20] sustained the point of order and said:

The rules of the House provide that the gentleman must send a resolution to the Clerk's desk in raising a question of constitutional privilege.

In order for the gentleman to have the right to make such a statement to the House, he must send a resolution to the Clerk's desk and have it read, on which the House may then act. The gentleman would then have one hour in which to address the House, if he presented a question of constitutional privilege.

[16] Champ Clark, of Missouri, Speaker.
[17] Record, p. 3126.
[18] House Report No. 1628.
[19] Second session Seventy-second Congress, Record, p. 2042.
[20] John N. Garner of Texas, Speaker.

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Mr. McFadden submitted that he was entitled under the rules governing the presentation of questions of privilege to make a statement of his proposition.

The Speaker dissented and said:

Not prior to the submission of a resolution. That is true of a question of personal privilege, but the gentleman rises to a question of constitutional privilege. This can only be done by the presentation of a resolution upon which the constitutional question is based. A mere statement by the gentleman does not comply with the rules of the House. If the gentleman has no resolution involving a constitutional question, the Chair thinks he is not entitled to recognition. The gentleman must present a resolution in the first instance on which to base his statement to the House, and then would be entitled to one hour.

Mr. McFadden called attention to occasions on which impeachment proceedings had been set in motion through memorials and other methods than those referred to by the Speaker:

The Speaker rejoined:

When such memorials and petitions are presented to the House, they are referred to the committee having jurisdiction of the particular subject. If a Member of the House bases his question of privilege on a memorial or petition, the memorial or petition must first be reported by the Clerk, and then the House may take such action as it sees fit. If the gentleman has a communication of that character, let him send it to the Clerk's desk and the Clerk will report it. Then the House can take such action as it deems proper. The gentleman can not get the floor under the proposition he has presented at the present time unless he sends up a resolution or motion.

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Function of the Senate in Impeachment[1]

1. Does the Senate sit as a court? Section 471.

471. During the Archbald trial the functions of the Senate sitting for an impeachment trial were discussed by managers and counsel for respondent.

On January 9, 1913,[2] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Alexander Simpson, of counsel for respondent, in final argument said:

The question is whether or not the duty which you have to perform is in point of fact a judicial duty. It must be conceded that it is not a legislative duty. That is perfectly clear. It is certainly equally clear that it is not an executive duty. I can not see what else remains unless it is a judicial duty.

But the Constitution in its various articles has made that exceedingly clear. In Article I, section 3, it says "the Senate shall have the sole power to try all impeachments." It says, "when the President of the United States is tried the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the Members present." It says, "judgment in cases of impeachment shall not extend further than to removal from office," and so on, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to the law." It says in Article II, section 2, "the President * * * shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment," and Article III, section 2, lastly says, "the trial of all crimes except in cases of impeachment shall be by jury, and such trial shall be held in the State where the said crime shall have been committed."

Now, I want to ask if it is possible to use words more clearly demonstrative that that which you as Senators are doing, you are doing in a judicial capacity? That is what I am claiming at this stage. It will reach up itself to its proper conclusion after a little while. The point is, you are in fact sitting as judges. I read, for it expresses briefly the thought, the language of Professor Dwight in 6 American Law Register (n. s.), 258–259:

"When a criminal act has been committed, it may evidently be regarded in three aspects: first, the injury to the individual or his family may be considered; second, the wrong to the executive officer charged with the administration of the laws may be looked at; and, third, the mind may dwell upon the general wrong done to the State, or 'the people,' as we say in modern times. This view was early taken in the common law; the injury to the individual was redressed by a proceeding called an appeal; the injury to the King by a process called an indictment; the wrong to the entire nation by a proceeding called an impeachment. In process of time the injury to the individual came to be regarded as a private and not as a public wrong, so that in the progress of the law there remained two great criminal proceedings—indictment and impeachment."

If the position I have taken on this point be accurate, we ought to be able to take the next step, and a long one, in regard to this matter. If this is a court then it is perfectly evident that the rules which experience has demonstrated to be wise and applicable in trials in other courts ought to be applied here; and among those rules, which are down at the very foundation of Anglo-Saxon jurisprudence, are those which relate to the effect of character evidence, to the effect of the reasonable doubt doctrine, to the effect of the presumption of innocence, and to the effect to be given to admissions made during the trial.

Replying to this argument on the following day,[3] Mr. Manager Henry D. Clayton, of Alabama, said:

[1] Cannon's Precedents, vol. 6, p. 664 (1936).
[2] Third session Sixty-second Congress, Record, p. 1271.
[3] Record, p. 1345.

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Mr. President, much has been attempted by counsel for the respondent in their effort to show that this is a court in the ordinary acceptance of that term. Whatever name you may call this body sitting here now, whatever functions they may discharge, it can not be said to be a court as that word is employed in the Constitution or understood by the ordinary man. It is more than a court. Under our Government it is clothed with the highest and most extraordinary powers of any body or any functionary or any agency of our Federal Government. Your powers here invoked are political in their nature. Mr. Bayard announced that doctrine in the first impeachment case, that of Blount. Every commentator, including Story and all the rest, has quoted it with approval, and should any man deny it he would at ounce confess himself ignorant of the history and the law of impeachments.

Mr. Manager Clayton quoted from Article III of the Constitution and continued:

So we form a correct conception of what this tribunal is, its purposes and its powers. Again, if it be necessary, let me ask from what power did this judge derive that trust which he has violated? Did he derive it from the judicial power? No. It was derived from the exercise of a political power. The President, exercising political power, nominated him for this office, and the Senate of the United States, with its power of disapproval, with its vitalizing power of confirmation, before he could become a public officer exercised not a legislative function, not a judicial function, but brought into operation a power which in its very nature and in any just conception you can take of it was a political power.

Now, Mr. President, I say this because I want to get away from the murky and unhealthful atmosphere of a police court, and I want to try on a higher plane this great cause, involving the rights—the civil rights—the power, and the majesty of the American people on the one side and on the other the puny privilege of an unfaithful judge, to desecrate his official position. It is political. Why? Because under representative institutions that is the only way under our Constitution that the political power exercised in the creation of a Federal judge can be performed. Under the State constitutions, or most of them, that political power is exercised by the people in their primary capacity when they select by ballot their judges to preside over them and administer public justice.

Mr. Manager Clayton then read citations from the following authorities: The Works of Charles Summer, Vol. XII, E. 415, 6th S., 93, p. 321; Samuel J. Tilden, Public Writings and Speeches, vol. 1, p. 474; Rawle, on the Constitution, p. 211.

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Procedure of the Senate in Impeachment [1]

1. Sittings and adjournments. Section 472.
2. Functions and powers of Presiding Officer. Section 473.
3. Arguments on preliminary or interlocutory questions. Section 474.
4. Voting and debate. Section 475.
5. Rules, practice, etc. Sections 476–478.

472. The hour of adjournment of the Senate, sitting for an impeachment trial, being fixed, a motion to adjourn at another time is not in order.

On December 5, 1912,[2] the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, agreed to this order.

Ordered, That the daily sessions of the Senate, sitting in the trial of impeachment of Robert W. Archbald, shall, until otherwise ordered, commence at 1 o'clock and 30 minutes in the afternoon and continue until 6 o'clock in the afternoon of each day.

On the following day [3] Mr. Jacob H. Gallinger, of New Hampshire, moved that the Senate, sitting in the trial of articles of impeachment, adjourn at another hour than that previously ordered.

The President pro tempore held that the hour for ending the daily session, having been fixed by order of the Senate, could be altered only by unanimous consent or by order formally passed by a majority of the Senate, and the motion of the Senator from New Hampshire was not in order.

473. The Senate elected a presiding officer for the Archbald trial, who thereupon exercised the powers of the President of the Senate in signing orders, writs, etc.

On December 16,[4] the term for which Mr. Augustus O. Bacon, of Georgia, was chosen President pro tempore of the Senate, having expired, Mr. Jacob H. Gallinger, of New Hampshire, was elected President pro tempore of the Senate, and thereupon requested that he be relieved from the duty of presiding over the Senate sitting as a court in the impeachment of Robert W. Archbald.

Whereupon Mr. Lodge submitted the following resolution, which was unanimously agreed to:

Resolved, That the Hon. Augustus O. Bacon, a Senator from the State of Georgia, be, and he is hereby, appointed to preside during the trial of the impeachment of Robert W. Archbald, circuit judge of the United States.

[1] Cannon's Precedents, vol. 6, p. 666 (1936).
[2] Third session Sixty-second Congress, Record, p. 170.
[3] Record, p. 230.
[4] Third session Sixty-second Congress, Record, p. 696.

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474. Argument on incidental questions arising during the trial of an impeachment is properly confined to an opening, a reply, and a conclusion.

On December 4, 1912,[5] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, at the conclusion of a colloquy between managers and counsel for the respondent, the President pro tempore said:

The Chair desires, in the interest of expedition and orderly procedure, to suggest to both the managers on the part of the House and counsel for the respondent that hereafter when incidental questions are to be discussed they be confined to an opening and a reply and a conclusion. The Chair will not rule that arbitrarily or positively, but trusts that counsel will act upon its suggestion.

475. In impeachment trials all orders and decisions of the Senate, with specified exceptions, are by the yeas and nays, but the yeas and nays may be waived by unanimous consent.

On December 4, 1912,[5] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, the question of the admission of a certain exhibit offered by the managers being submitted to the Senate, Mr. Moses E. Clapp, of Minnesota, asked if the requirement under the rule for a yea-and-nay vote could be waived.

The President pro tempore replied:

If it is unanimous, the Chair is of the opinion that a yea-and-nay vote is not required, because it is the same as if every Senator voted.

Upon the suggestion of Mr. Clapp, the President pro tempore put the question:

Is there objection by any Senator to the admissibility of the paper in evidence?

Whereupon Mr. Clarence D. Clark, of Wyoming, objected, and the roll was called.

476. Managers on the part of the House having verbally notified the Senate of the impeachment of Judge Archbald, formal reading of articles of impeachment was delayed for proclamation by the Sergeant at Arms.

On July 13, 1912,[6] (legislative day of July 6), in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after Mr. Manager Clayton had read the resolution adopted by the House, informing the Senate that the House had impeached Judge Archbald, he proposed to read the articles of impeachment, when Mr. Henry Cabot Lodge, of Massachusetts, interposed and said:

Mr. President, before the presentation by the managers on the part of the House of the articles of impeachment, section 2 of the Rules of Procedure and Practice in the Senate when sitting on impeachment trials requires that the Sergeant at Arms shall make proclamation as therein prescribed.

Thereupon, by direction of the President pro tempore, the Sergeant at Arms made proclamation, at the conclusion of which Mr. Manager Clayton read the articles of impeachment drawn by the House.

477. After trial of impeachment had proceeded for several days, the formality of announcement by the Doorkeeper of appearance in the Chamber of the managers and the respondent was by consent dispensed with.

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[5] Third session Sixty-second Congress, Record, p. 107.
[6] Second session, Sixty-second Congress, Senate Journal, p. 625; Record, p. 8989.

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On July 29, 1912,[7] in the Senate, at the opening of the trial of the impeachment of Robert W. Archbald, the Doorkeeper of the Senate announced formally the appearance of the respondent and the managers on the part of the House of Representatives.

This ceremony continued to be observed each day until December 3, 1912,[8] when Mr. Henry D. Clayton, of the managers on the part of the House of Representatives, suggested:

> Mr. President, if it is agreeable to the Senate sitting as a Court of Impeachment, hereafter the managers on the part of the House of Representatives will appear without the formality of an announcement.

To which Mr. Worthington, of counsel, on behalf of the respondent, added:

> I presume that might apply, Mr. President, to the counsel for the respondent and to the respondent himself.

The President pro tempore said:

> The Chair will give proper direction in that regard.
> Proper order will be given in the premises.

The appearance of the managers and the respondent was not thereafter announced.

478. The expenses of the Archbald trial were defrayed from the Treasury.

On July 16, 1912,[9] the Senate, in legislative session, agreed to the following resolution:

> *Resolved, etc.*, That there be appropriated from any money in the Treasury not otherwise appropriated the sum of $10,000, or so much thereof as may be necessary, to defray the expenses of the Senate in the impeachment trial of Robert W. Archbald.

This resolution was agreed to by the House on July 27, without amendment and was approved by the President on July 31.

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[7] Second session Sixty-second Congress, Record, p. 9795.
[8] Third session Sixty-second Congress, Record, p. 20.
[9] Second session Sixty-second Congress, Senate Journal, p. 460; Record, p. 9118.

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Conduct of Impeachment Trials [1]

1. Form of summons. Section 479.
2. Answer of respondent, replication, etc. Sections 480, 481.
3. Counsel and motions. Sections 482, 483.

479. The writ of summons issued for the appearance of Judge Archbald to answer articles of impeachment does not appear in the Journal.

Form of return appended to the writ of summons served by the Sergeant at Arms on the respondent.

On July 16, 1912,[2] the Senate, sitting for the trial of the impeachment of Robert W. Archbald, agreed to an order directing that a summons be issued as required by the rules of procedure and practice, returnable on Friday, the 19th.

The text of this writ does not appear either in the Record or in the Journal.

On July 19,[3] however, immediately after the approval of the Journal, the Secretary, by direction of the President pro tempore, read the return appended to the writ of summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Robert W. Archbald, and the foregoing precept, addressed to me, were duly served upon the said Robert W. Archbald, by delivery to and leaving with him true and attested copies of the same as 236 Monroe Avenue, Scranton, Pa., the residence of Robert W. Archbald, on Wednesday, the 17th day of July, 1912 at 11 o'clock and 30 minutes in the afternoon of that day.

DANIEL M. RANSDELL,
Sergeant at Arms United States Senate.

480. In the trial of the impeachment of Judge Robert W. Archbald the procedure of former trials of impeachment was observed, in that briefs were not submitted until after managers and counsel for respondent had made opening statements and introduced witnesses.

Form of order providing for filing and printing of briefs by managers and respondent in trial of impeachment.

On December 4, 1912,[4] in the Senate, sitting for the trial of Robert W. Archbald, Mr. William E. Borah, of Idaho, sent to the deck a question, in writing, addressed to the managers on the part of the House of Representatives.

The President pro tempore said:

The Senator, from Idaho propounds, in writing, the following inquiry for the consideration of the managers, and the Secretary will read it.

[1] Cannon's Precedents, vol. 6, p. 669 (1936).
[2] Second session Sixty-second Congress, Senate Journal, p. 629; Record, p. 9124.
[3] Record, p. 9275; Senate Journal, p. 629.
[4] Third session Sixty-second Congress, Record, p. 97.

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The Secretary read as follows:

Are the managers prepared at this time to present their brief as to our power to impeach for offenses or acts which were not committed or done during the term of the office which the party charged now holds?

In reply to this inquiry Mr. Henry D. Clayton, of Alabama, for the managers, submitted:

Mr. President, on behalf of the managers, in reply to the suggestion, I beg to say that that question has been thoroughly considered by the managers, and they have no doubt that this judge can be impeached for a misbehavior of a grave character that he may have committed while he held the office of district judge, his tenure of the one having dovetailed into the tenure of the present office.

We have gathered as best we could the authorities to sustain that position. We have made a brief, and we are prepared to make the argument on that proposition.

But, Mr. President, the managers have not up to this time deemed it proper or, I might say, advisable to bring that question to the attention of the court, for the reason that we are pursuing in this case the practice which was pursued in other cases, notably the practice in the Swayne case. After the statement of facts in that case, as the present occupant of the chair knows, immediately the managers began the introduction of their witnesses, and neither the law nor the facts bearing upon any phase of the different controversies involved in that case were argued until the respondent had also made his opening statement and introduced his witnesses; and after all the witnesses had been examined, then the case was opened for discussion both upon the law and the facts.

So, Mr. President, the managers have followed what they deemed the practice to be in like cases.

On the following day,[5] on motion of Mr. John D. Works, of California, it was

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

Mr. Worthington, of counsel for the respondent, then said:

I can say, Mr. President, we can certainly have that done this week.

481. Correction of errors in the report of the proceedings of the Senate, sitting in trial of impeachment as reported in the Record, is properly made after the reading and approval of the Journal.

On December 4, 1912,[6] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, after the reading and approval of the Journal, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, called attention to inaccuracies in the report of the proceedings of the previous day as printed in the Record, and said:

Mr. President, the managers desire to call the attention of the court to a verbal inaccuracy in the proceedings of yesterday. It, perhaps, is immaterial to the statement as made on yesterday, but for the sake of better English I desire to have a correction made in the Record.

Mr. Manager Clayton then referred to particular pages of the record and indicated a number of corrections desired.

The President pro tempore said:

The correction will be made as desired by the manager.

482. Instance in which on motion of counsel for respondent, and over protest of managers for the House, the Senate granted the respondent 10 days in which to answer articles of impeachment.

On July 19, 1912,[7] in the Senate, sitting for the impeachment trial

[5] Senate Journal, p. 318.
[6] Third session Sixty-second Congress, Record, p. 96.
[7] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9277.

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of Robert W. Archbald, counsel for the respondent submitted the following motion:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

UNITED STATES *v.* ROBERT W. ARCHBALD.

The respondent, by his counsel, now comes and moves the court to grant him the period of—days in which to prepare and present his answer to the articles of impeachment presented against him herein.

R. W. ARCHBALD, Jr.
A. S. WORTHINGTON.

JULY 19, 1912.

Thereupon Mr. Clark, of Wyoming, asked for the adoption of the following order:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 24th day of July, 1912.

Whereupon Mr. Worthington, of counsel for the respondent, submitted:

Mr. President, I should like to state that that time seems very short to the counsel for the respondent, in view of the number of articles of impeachment which are here and the customs which have been followed heretofore in cases of this kind, and also because of certain circumstances which exist in this case, which I wish to bring to the attention of the court.

It was for that reason that in the motion which we made we left blank the number of days which we were to have, to be filled at the pleasure of the court.

I had hoped we might get 20 days for that purpose. As I calculate the time proposed to be given by the order which has just been presented by a member of the court, it would give us but 5 days, which, I think, would be entirely insufficient, in view of the fact that one of those days is dies non.

On behalf of the respondent and his counsel, I therefore respectfully ask that we be given at least 20 days for the purpose indicated.

To which Mr. Manager Clayton responded:

After a conference had this morning the managers reached the conclusion that perhaps four or five days would be ample time to afford the accused the opportunity of fully answering all the articles of impeachment in this case.

The managers think there is nothing by way of surprise contained in the articles of impeachment. We believe Judge Archbald and his counsel are well informed as to every charge set forth in the articles of impeachment. We think five days—or four days, if one day be excluded on account of its being dies non juridicus—are quite sufficient for Judge Archbald to answer these articles of impeachment. Their nature is fully understood. The testimony which induced the House to adopt these articles is perfectly familiar to the counsel and perfectly familiar to the accused.

Mr. Porter J. McCumber, of North Dakota, moved to amend the order to read:

Ordered, That the respondent present his answer to the articles of impeachment at 12 o'clock and 30 minutes postmeridian on the 31st day of July, 1912.

A suggestion by Mr. Henry Cabot Lodge, of Massachusetts, that the date proposed be amended to read "Monday, the 19th day of July," was accepted and the order with this amendment was agreed to.

483. In the Archbald trial new rules of procedure and practice of the Senate, when sitting in impeachment trials, were not adopted, the rules framed in former trials being considered as operative.

On July 15, 1912,[8] on motion of Mr. Clarence D. Clark, of Wyoming, extracts from the Journals of the Senate containing the record of

[8] Second session, Sixty-second Congress, Senate Journal, p. 454.

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former impeachment trials were ordered printed. No further preliminary action with reference to procedure in the pending trial of the impeachment of Judge Archbald appears, and the "Rules of procedure and practice of the Senate when sitting in impeachment trials" observed in former trials, and to all intents identical with those revised and adopted in 1868* for the Johnson trial, and followed in the Belknap and Swayne trials, were treated as existing rules.

* Second session Fortieth Congress, Senate Journal, pp. 794, 870, 878, 937; Senate Report No. 59.

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Presentation of Testimony in an Impeachment Trial [1]

1. Attendance of witnesses. Sections 484–486.
2. Examination of witnesses. Sections 487–489.
3. Rulings of presiding officer as to evidence. Sections 490, 491.
4. Cross-examination, rebuttal evidence, etc. Section 492.

484. Lists of witnesses to be subpoenaed in a trial of impeachment are supplied by the managers and respondent respectively to the Sergeant at Arms of the Senate.

After the filing of lists of witnesses to be subpoenaed in a trial of impeachment, further witnesses may be subpoenaed on application of the managers or the respondent made to the Presiding Officer.

On August 6, 1912,[2] in the Senate, sitting for the impeachment trial of Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, chairman of the managers for the House of Representatives, said:

On behalf of the managers of the House, I desire to say that the managers will furnish—I presume that it ought to be furnished to the Secretary of the Senate—a list of the witnesses whom the managers desire to have subpoenaed on behalf of the prosecution, if I may so term the side which is occupied by the managers on the part of the House. Am I correct in the view that we shall furnish this list to the Secretary of the Senate?

The President pro tempore replied:

The Presiding Officer is not advised as to what are the precedents, but as the Sergeant at Arms is to execute the order, the Chair will suggest that the Sergeant at Arms is the proper person to whom the list should be supplied.

Mr. Manager Clayton inquired:

Then Mr. President, under the intimation of the Chair, the managers beg to say at this time that they will in due time furnish the Sergeant at Arms a list of the witnesses they desire subpoenaed, and they expect to be ready, by having the witnesses here and ready otherwise to proceed with the cause, if it meets the pleasure of the Senate, on the 3d day of December next.

Mr. Manager Clayton further inquired:

Mr. President there is one other thing that the managers desire to know. There is no settled practice, it appears from my rather imperfect examination of the precedents in the case, but I have reached the conclusion from such examination as I have been able to make that after this list is furnished by the managers and the list furnished on behalf of the respondent by the respondent that then it is the practice or the usage of the Senate, under, I suppose, certain discretion vested in the Presiding Officer, to entertain and to direct the issuance of subpœnas for other witnesses whose names may not appear on the list which

[1] Cannon's Precedents, vol. 6, p. 673 (1936).
[2] Second session Sixty-second Congress, Record, p. 10139.

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is furnished in the first instance; and believing that to be the practice and believing that the managers should have that right. I shall not insist upon the proposition which I offered in the beginning of the case today; that is, to provide that these additional witnesses might be subpoenaed on application made by the managers or the respondent, as the case might be, but that the application should be made to the Presiding Officer; the Presiding Officer having the discretion and presumably the authority to grant a request for additional witnesses.

Putting that interpretation upon the matter, Mr. President, we shall not ask any amendment of the order at this time, for it is presumed that this court like any court that wants to do justice in the premises, would, notwithstanding any rule to the contrary, or because of the absence of any positive rule making provision for such an emergency, direct the subpoena of witnesses if, in the judgment of the court, it ought to be done to meet the manifest ends of justice.

The President pro tempore said:

The Chair will state that the manager has stated the practice as it is understood and contemplated by the Senate in that regard.

485. Under a rule of the Senate subpoenas or other writs are signed by the Presiding Officer, whether the Vice President or President pro tempore, during session of the Senate sitting in trial of impeachment or in vacation.

On August 3, 1912,[3] in the Senate, sitting for trial of the impeachment of Robert W. Archbald, Mr. William J. Stone, of Missouri, propounded the following inquiry:

Mr. President, I should like to propound an inquiry. The Presiding Officer, in other words, the Senator who shall preside, I presume is to attach his signature to the subpœnas for witnesses Is that correct?

On response, the President pro tempore directed the Secretary to read the following rule of the Senate:

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules, or by the Senate and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

Mr. Stone then inquired:

Then under the rule the Vice President will be the Presiding Officer who would sign all writs.

Would the present occupant of the chair be clothed with that power during the vacation? Application for the issue of subpœnas for witnesses will be made during the vacation of the Senate, in all probability; probably in November. It puzzles me a little bit to know who would sign those writs.

The President pro tempore said:

The Chair does not think there is any trouble at all about it. Whoever is the presiding officer at the time the writ is required would, in the opinion of the present occupant of the chair, be clothed with that power. The Vice Preisdent, of course, will be during the vacation the presiding officer of the Senate, and if the Senate should indicate anyone else to be President pro tempore during that time, the power would be exercised in the first instance by the Vice President, or, if he should be under disability, by the President pro tempore, whoever he might be.

486. The Senate, sitting for the Archbald trial, ordered process to compel the attendance of a witness who had disregarded a subpoena duly served by the Sergeant at Arms.

Form of order for attachment of delinquent witness.

A dilatory witness who failed to appear until after attachment had been ordered was admonished by the President pro tempore.

[3] Second session Sixty-sixth Congress, Record, p. 10140.

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On December 5, 1912,[4] in the Senate, sitting for trial of the impeachment of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

Mr. President, at the session held by the managers this morning, it was called to our attention that a certain witness who has been subpoenaed announced that he did not intend to come here unless brought on process issued by the Senate. It appeared yesterday, Mr. President, from reading the returns of the Sergeant at Arms, that Mr. J. H. Rittenhouse, an important witness in this case, had been regularly subpœnaed to attend and was required to be here yesterday. He was not here yesterday. He is not here to-day. He is the witness, who we are informed, said he would not come unless brought here by process of the Senate.

Therefore, Mr. President, I ask to have called the officer who served the subpoena upon the witness and prove the service. Then I shall ask for an attachment to bring him here.

Mr. James K. Julian, being called and sworn, testified, that as an employee in the office of the Sergeant at Arms, he had served J. H. Rittenhouse personally with a subpoena. The Sergeant at Arms was then directed to call the said James H. Rittenhouse, and on his failure to respond, Mr. Manager Clayton moved for an attachment, which was unanimously ordered, as follows:

Ordered, That an attachment do issue in accordance with the rules of the Senate of the United States for one J. H. Rittenhouse, a witness heretofore duly subpoenaed in this proceeding on behalf of the managers of the House of Representatives.

Later on the same day Mr. Manager Clayton stated that the witness, James H. Rittenhouse, had appeared and was now in the corridor and asked that he be admonished to be present until discharged.

The PRESIDENT PRO TEMPORE. The witness will be brought into the presence of the Senate.

James H. Rittenhouse appeared in the Chamber.

The PRESIDENT PRO TEMPORE. Mr. Witness, you are brought before the Senate to be admonished that you must scrupulously obey the orders you have received in the summons to appear here and not to absent yourself without leave of the Senate. You may now retire.

Thereupon Mr. Rittenhouse retired from the Chamber.

The PRESIDENT PRO TEMPORE. Does the manager on the part of the House desire that the order for attachment be vacated?

Mr. Manager CLAYTON. I ask that that be the course pursued.

The order for the attachment was then vacated.

487. The posture and position of managers and counsel in trials of impeachment has been left to their own judgment and preference.

On December 4, 1912,[4a] in the Senate, sitting for the trial of the impeachment of Robert W. Archbald, Mr. Worthington, of counsel for the respondent, inquired:

Mr. President, may I ask a question? The practice differs. In some courts it is required that counsel examining a witness shall stand; but it is not customary where I have been; and I presume it is a matter about which the examining counsel or manager may use his judgment.

The PRESIDENT PRO TEMPORE. Absolutely, on both sides. The managers and counsel may assume such posture as they prefer.

On the following day,[5] in concluding the examination of a witness, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, said:

[4] Third session Sixty-second Congress, Senate Journal, p. 318; Record, p. 152.
[4a] Third session Sixty-second Congress, Record, p. 98.
[5] Record, p. 152.

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It has been suggested that the few remaining questions which I am to ask this witness may be heard more distinctly by standing at this point in the Chamber.

Mr. Webb then concluded the examination standing in the central aisle.

488. Witnesses in an impeachment trial were required to stand when necessary in order to be better heard.

Witnesses whose testimony was audible when seated were permitted to testify from a seat at the Secretary's desk.

On December 4, 1912,[6] in the Senate during the examination of a witness, in the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, inquired:

Mr. President is it desired that the witness shall sit or stand?

The President pro tempore said:

The present position of the witness is probably the one from which he can be best heard by the Senate.

Mr. Miles Poindexter, of Washington, also inquired:

Mr. President, is it required that the witness should remain standing while he is giving his testimony?

The President pro tempore said:

The Chair directed that he should, because he did not think that if the witness took his seat he could be heard on the other side of the Chamber.

It is for that purpose that it was directed that the witness should stand; otherwise, of course, he would be permitted to sit.

As the trial progressed, however, it appears that witnesses whose testimony was audible were provided with a seat at the desk of the Secretary.[7]

489. Discussion of the order in which witnesses should be sworn in trial of impeachment.

Procedure to be followed in the swearing of witnesses having been left to managers and counsel, witnesses were sworn as produced.

On December 4, 1912,[8] in the Senate, preliminary to the presentation of evidence in the impeachment trial of Judge Robert W. Archbald, Mr. Henry D. Clayton, of Alabama, of the managers on the part of the House of Representatives, said:

We ask at this time that the Secretary read the whole list of witnesses on behalf of the managers on the part of the House of Representatives, and then after that list is read I will do as the Chair may suggest, either have all the witnesses sworn en bloc or have each one sworn separately as we produce him to testify. If the Chair would prefer that each witness be sworn separately as he is produced, that course will be followed.

The PRESIDENT PRO TEMPORE. The presumption is that the Senate will allow the managers to pursue their own course in that matter.

Mr. Manager CLAYTON. I would therefore ask that the witnesses be called and all of them required to enter the Chamber who are present to-day and that the oath be administered to them.

The PRESIDENT PRO TEMPORE. The Secretary will call the names of those who are here.

The Secretary read the list of witnesses for the managers on whom service had been made.

Mr. Manager CLAYTON. I suppose, Mr. President, that it would be a difficult matter for the Secretary to call the names of witnesses.

[6] Third session Sixty-second Congress, Record, p. 98.
[7] Record, p. 152.
[8] Third session Sixty-second Congress, Record, p. 97.

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The PRESIDENT PRO TEMPORE. Are the managers prepared to furnish the names of those whom they now wish to be sworn? If so, they will be called into the Chamber.

Mr. Manager CLAYTON. We will proceed to swear each witness as we produce him.

The PRESIDENT PRO TEMPORE. Very well; that course is preferred.

490. In the Archbald trial the Senate declined to admit and reserve decision on the admissibility of evidence to the admission of which an objection was pending.

Questions as to admissibility of evidence in impeachment trials are not debatable.

On December 4, 1912,[9] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, a question as to the admissibility of certain evidence having arisen, Mr. Miles Poindexter, of Washington, inquired:

Mr. President, I should like to inquire if it be within the rules of the Senate sitting as a court of impeachment to receive this evidence and to reserve a decision as to its admissibility? That practice is common in the courts. If we undertake to vote upon each objection to the testimony, or at least each important objection to the testimony of witnesses——

The President pro tempore answered:

The Senator has no right under the rule to discuss the question. The Senator has the right, if he so desires, to submit an order to the Senate, which would cover the point that he wishes to make.

Thereupon Mr. Poindexter submitted the following order:

Ordered, That the evidence be received and the decision as to its admissibility be reserved.

Mr. Poindexter proposed to debate the question, when the President pro tempore ruled:

The Senator has not the right to discuss it.

Mr. POINDEXTER. Have I no right to make an explanation?

The PRESIDENT PRO TEMPORE. No.

The question being submitted to the Senate, it was decided in the negative, yeas 3, nays 57, so the order was not adopted.

491. Questions as to admissibility of evidence in a trial of impeachment are by long-established custom, submitted by the Presiding Officer to the Senate for decision.

On December 4, 1912,[10] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. Edwin Yates Webb, of North Carolina, of the managers on the part of the House of Representatives, offered in evidence a copy of an assignment of two options covering a culm bank, executed on September 5, 1911, to which Mr. A. S. Worthington, of counsel for the respondent, interposed an objection. After argument on the admissibility of the exhibit, the President pro tempore said:

Before taking action in regard to this question the Chair desires to make a statement to the Senate. Anticipating that questions of the admissibility of evidence would arise, the present occupant of the chair has examined former impeachment cases in order to ascertain what was the practice of Presiding Officers themselves in regard to deciding questions of this character or of submitting them to the Senate. Upon examination it is found in former impeachment

[9] Third session Sixty-second Congress, Record, p. 106.
[10] Third session Sixty-second Congress, Record, p. 106.

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cases that very liberally, to say the least, the Presiding Officer had availed himself of the privilege of submitting the matter to the Senate. In the Andrew Johnson impeachment case in particular, which was presided over by the highest judicial officer in the land, Chief Justice Chase, almost invariably every question as to the admissibility of evidence was submitted by him to the Senate for its determination. While the present occupant of the chair is not averse to taking responsibility in a matter that is alleged by the counsel to be peculiarly vital to the case, he feels that the matter should be submitted to the Senate. He is more inclined to that course by the fact that if one single Senator differed from the conclusion of the Chair he would have the right to have the vote taken by the Senate. Therefore, in this case the present occupant of the chair will submit to the Senate the question as to the admissibility of the evidence.

492. The President pro tempore ruled, in the Archbald trial, that counsel in examination might confine a witness within the limits of his interrogation, but witness should have opportunity either in direct examination or under cross-examination, to explain fully any answer made.

On December 6, 1912,[11] in the Senate sitting for trial of the Archbald impeachment, during the examination of a witness on behalf of the managers, Mr. Alexander Simpson, of counsel for the respondent, submitted an objection, saying:

I submit, Mr. President, when a witness is answering a question he has a right to complete his answer so as to make it clear to the Senate what his answer is, and the manager has no right to interrupt him in making a clear statement as to what his answer is. If the witness gets beyond that point, of course the manager has the right to interrupt him.

The President pro tempore ruled:

The Chair will rule that the manager has the right to conduct his examination in his own way and confine it within the limits of his questions, if he desires to do so, and that then the witness shall, before he leaves the stand, have full opportunity to explain any answer he has made. The manager in examining a witness has the right to confine him within the limits of the interrogation which he desires to submit, but the witness certainly must have the opportunity, either before the direct examination concludes or under cross-examination, to explain fully any answer which he may make.

[11] Third session Sixty-second Congress, Record, p. 224.

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Rules of Evidence in an Impeachment Trial [1]

1. Strict rules of the courts followed. Sections 493, 494.
2. As to opinions of witnesses. Section 495.
3. General decisions as to evidence. Sections 496, 497.

493. Under recognized rules of evidence, leading questions were ruled out in a trial of impeachment and witnesses were admonished to observe established procedure.

On December 4, 1912,[2] in the Senate, sitting for the trial of the impeachment of Judge Robert W. Archbald, during the direct examination of a witness on behalf of the House of Representatives, Mr. Worthington, of counsel for the respondent, objected to a question propounded by Mr. Manager Edwin Yates Webb, of North Carolina, and said:

One moment, please. I submit, Mr. President, we had as well try this case with some appearance of conformity to the rules of a court. That was a leading question, which ought never to have been asked and should not be allowed to be answered.

The President pro tempore ruled:

Counsel, as far as possible, will avoid leading questions.

During the examination of the same witness by Mr. Manager Webb, Mr. Worthington objected to a question asked the witness by Mr. Manager Webb as a leading question. The witness, however, answered the question and Mr. Worthington said:

As the witness has already answered the question, for the present purposes it is futile to proceed. I think the witness should be cautioned, when objection is made, not to answer a question until the Presiding Officer or the Senate has ruled upon it.

The PRESIDENT PRO TEMPORE. That is a very proper suggestion. The witness will be governed by that. Hereafter when there is an objection to testimony the witness will not reply until after the matter has been passed upon.

494. Evidence may be introduced by counsel to contradict testimony in chief given by their own witness only upon statement that such testimony is at variance with that expected and that relying on evidence previously given by the witness, they have been surprised and entrapped.

Instance wherein the President pro tempore ruled on the admission of evidence in the trial of an impeachment.

On December 6, 1912,[3] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, Mr. John A. Sterling, of Illinois, of the managers on the part of the House of Representatives, offered testimony in the following words:

[1] Cannon's Precedents, vol. 6, p. 679 (1936).
[2] Third session Sixty-second Congress, Record, p. 98.
[3] Third session Sixty-second Congress, Record, p. 222.

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Mr. President, we offer Exhibit 7, the examination of Edward J. Williams at Scranton, Pa., March 16 and March 17 of this year, made by Mr. Wrisley Brown, representing the Department of Justice, who was sent there by the Attorney General to investigate this case.

Objection to admission of the deposition was made by Mr. A. S. Worthington, of counsel for the respondent.

After extended argument by managers and counsel, the President pro tempore ruled:

If the proposition be simply to disprove the statement of the witness as to the number of questions which had been asked by Mr. Boland, the Chair would undoubtedly rule that only the questions themselves could be put in evidence for the purpose of contradicting him to that extent. But the Chair thinks it is a well-recognized rule, which is found in every jurisdiction, that where a witness is put up by a party and where the party who offers him as a witness has had previous information from him as to what his testimony would be, and upon his examination he gives testimony contrary to that former testimony, the party offering that witness can prove the former statements of the witness if he will state in his place that he has been entrapped by him; that relying upon the evidence that he had given and that he would again testify as he had previously done, they have put him up and they have been entrapped and surprised by the fact that he then testified to matters in conflict to what he had previously testified.

The Chair thinks that is a well-recognized rule of law. It is not for the purpose of impeaching the witness, though it might be called one class of impeachment. It is for the purpose of negativing testimony which he had given and which the counsel otherwise would be bound by, they themselves having put him up.

The Chair will add, so far as the bulk of this testimony is concerned, unless it is in the main, generally as well as specifically upon the particular points in which the counsel have been entrapped, that only such parts of it as do relate to than contradiction in his testimony would be admissible, but on the statement of the counsel that they have been thus entrapped the Chair is of the opinion that to that extent it is admissible.

The President pro tempore further held:

Counsel for the respondent will, of course, have the right to recall the witness and require him to make such explanation of the apparent conflict as is proper and consistent with his information; he is not debarred from that privilege, but the purpose of that rule is not to impeach a witness and establish the fact that he is not to be believed on oath, because if that were the case a party could never put up an adverse witness. He is entitled to the testimony of this witness, and he is entitled to have the truth ascertained from the testimony of the witness and from his conflicting statements. The Chair thinks that is a correct rule of law, and that is the principle upon which it is based.

495. In the Archbald trial it was held that while witnesses might testify as to the general reputation of the respondent, and as to his reputation for judicial integrity in particular, it was not competent to introduce evidence as to his reputation for ability and industry; and in no event was the personal opinion of a witness on questions of character or reputation admissible.

On December 17, 1912,[4] in the Senate, sitting for the impeachment trial of Judge Robert W. Archbald, this question was asked by Mr. A. S. Worthington, of counsel for respondent, on the direct examination of Everett Warren, a witness subpoenaed on behalf of the respondent.

Now, Major Warren, I want to ask you to tell us from your long acquaintance with Judge Archbald and your observation of him as a judge what were his principal characteristics as a judge, as to integrity, ability, and industry.

Mr. Manager Norris objected, saying:

[4] Third session Sixty-second Congress, Record, p. 772.

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Mr. President, I object to the question as immaterial and irrelevant. The counsel has a right to ask the witness as to reputation, but I do not believe he can go beyond that.

Mr. Worthington argued:

I ask you to remember, Mr. President, that we are not trying this case before a jury. We are trying this case before a tribunal which is the judge of the law and the judge of the facts, and the tribunal which is to inflict the sentence as well.

The question which the Senate is to determine at the end of this case is not the mere question whether this or that thing is proved, but whether upon the whole, taking into consideration the character of the man, the good that he has done, the kind of judge that he is, what the people in and about Scranton think of him and know of him, he shall be deprived of office, and be held forever incapable of showing his head as a reputable man, because of the contention that has been made here that he is not fit to hold any office of any kind under the Government of the United States.

Now, one thing more, it seems to me, takes this entirely out of the considerations which are invoked in ordinary courts of justice when a similar question arises. When our forefathers framed this Constitution of ours, they put into it the provision that the trial of persons accused of crime shall take place in the districts where the crime was committed.

Now, Mr. President, in this case the trial has to be here in the Senate Chamber. This defendant can not have the benefit of being tried by his neighbors, the people who know him and know the witnesses against him.

We can not take the Senate to Scranton, but we do want to bring to this trial the atmosphere of Scranton so far as relates to Judge Archbald's reputation, and, as far as we can, give him the benefit of that which the meanest criminal throughout the Union has—to be tried in the place where the crime was committed and among people who know him and who know those who testify against him. W can not go there, where the witnesses generally know the man. We want Senators to know what the men who have spent their lives in and around Scranton practicing before Judge Archbald—his neighbors and friends—think of him and what his reputation is throughout the whole State of Pennsylvania.

Mr. Manager Clayton argued:

Mr. President, it is perhaps unnecessary for me to state the general rules governing the admission of character testimony, and perhaps it is also unnecessary for me to state the questions which have generally been propounded in such matters of inquiry and recognized as proper in places where character is put in issue.

I may say, Mr. President, in the beginning that we have not controverted the good character of Judge Archbald. Perhaps if we had controverted that a larger range would be permissible for the respondent in reply to that controversy raised by the managers. But the managers have not raised that question.

So, Mr. President, I take it that the rules of evidence are to be applied by the Senate in this case, first, for the purpose of doing justice both to the managers who represent the accusation, the House of Representatives, and of also doing justice to this respondent. Secondarly, and perhaps just as important, these rules are for the expeditious disposition of the cause. It is not to militate against the doing of justice in this case that we raise this question. We say that justice can be done within the rules which permit ordinary questions which are asked in ordinary cases about character, and the answers thereto. There is enough latitude in that to do justice to both sides in this controversy, especially to the respondent, where the managers have not assailed his character by introducing evidence for that specific purpose.

Mr. President, the next reason, to which I have adverted, is for the dispatch of his case. Any rule looking to the speedy termination of this case ought to be enforced unless its relaxation would favor the doing of more ample justice to all parties concerned. In this case I take it that the Senate will consider the respondent as having gotten all he is entitled to when he proves by those who know him the fact that they know him; the fact that they know his general reputation, and that his general reputation and his character, predicated upon that general reputation, is good. We have not controverted that, and therefore it does not seem to me that there is any necessity here for the enlargement of the rule.

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The Presiding Officer said:

The Chair thinks there is, of course, basis for the contention that rules should be liberal in practice in certain circumstances. Nevertheless, generally, the rules of law must be applied. The Chair thinks that the rule, generally, as to proof of character is, first, that anyone who is accused of misconduct may put in issue his general character, irrespective of what the charge is, because general character always is involved in any question of violation of law or misbehavior. Further, he may put in evidence his character as to the particular quality or characteristic which will elucidate the particular charge. With that view, the Chair thinks it is perfectly competent for the counsel to prove the general reputation of the respondent, as to whether or not he bears a good character, in the broadest sense of that term, and also that he may prove his general reputation as to the particular matter involved in issue.

Now, as the Chair understands, the particular matter involved here is a question of judicial integrity. So the Chair would not, if the Senate approves the opinion of the Chair, limit the counsel to proof of reputation for general good character, but would recognize the right of the respondent also to prove his general reputation for judicial integrity. But the Chair knows of no rule of law which permits a witness to give his individual opinion of the character of an accused. If there is any such case, the Chair has failed to learn of it in such experience as he has been fortunate enough to have.

This particular question is as to the opinion of the witness himself. If the counsel would limit his question to the witness's knowledge of the general character of the respondent for judicial integrity, the Chair would think that was competent; but this question not only asks the individual opinion of the witness, leaving aside the question of general reputation, but it goes further and asks for the opinion of the witness, not only as to integrity, but as to ability and industry, none of which characteristics or features are involved, as the Chair understands, in any issue before the Senate at this time. The Chair is therefore obliged to sustain the objection to this particular question, but will recognize the right of the respondent to proceed along the lines indicated, with every disposition to be as liberal as the rule will possibly permit.

496. Decision by the President pro tempore in the impeachment trial of Judge Archbald, on the latitude of counsel in cross-examination of witness relative to testimony previously given by the witness before a committee of the House.

On December 6, 1912,[5] in the Senate sitting for the impeachment trial of Judge Robert W. Archbald, during the cross-examination of W. A. May, a witness on behalf of the managers, by Mr. A. S. Worthington, of counsel for the respondent, Mr. Manager George W. Norris, of Nebraska, objected, saying:

Mr. President, before the witness answers the question, I desire to object to this form of interrogation of the witness. As I understand, we would not be allowed to call his attention to the testimony unless we had first asked him about the same matter and he had testified differently. Counsel has been asking questions of this witness, reading evidence that was taken before the Judiciary Committee, without any intimation that there is anything different in his testimony now. He reads a lot of testimony and asks the witness if that was true. It seems to me that that is not a proper examination of the witness.

The President pro tempore said:

The previous testimony of this witness can be read to him for two purposes. As the Chair recollects the rule, it can be read for the purpose of contradicting him or for the purpose of refreshing his memory. If counsel examine the witness as to a matter and his testimony is not clear on the subject, the Chair would hold that then, after having attempted to elicit testimony in the usual way without success, he could go further and call attention to the witness to what he had previously testified to by way of refreshing his memory. The Chair thinks that is the correct rule of law.

The Chair would suggest to counsel for the respondent that it is perfectly competent for him to put questions as to the particular matters that he desires to

[5] Third session, Sixty-second Congress, Record, p. 217.

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have testimony upon without reading from the questions and answers; but in either case the Chair would rule that counsel has the right to bring out the testimony if it is either for the purpose of calling attention to the fact that the witness had previously made conflicting statements, or for the purpose of refreshing his memory upon some things in regard to which he is not now clear.

497. A contract having been admitted as evidence in an impeachment trial, it was held competent to show the intention of the parties thereto.

Instance of a ruling by the President pro tempore on a question of evidence in an impeachment trial.

On December 6, 1912,[6] in the Senate, sitting in trial of the impeachment of Judge Robert W. Archbald, one of the managers called William L. Pryor, a witness to prove the charge that the respondent had been a silent party to a written contract previously admitted in evidence by vote of the Senate.

Mr. A. S. Worthington, counsel for the respondent, objected to questions propounded and submitted:

Mr. President, it was held by the Senate, by the vote on the first day of our taking testimony here, that this silent-party paper was admissible in evidence, or at least should be introduced here, although no evidence was offered tending to show Judge Archbald knew of it or authorized it. But I do not understand that that ruling went so far as to hold that the parties who may have made statements about Judge Archbald would be competent witnesses against him, or that any statement made against Judge Archbald by Pryor, or perhaps other persons who were in Boland's office, would be competent and proper evidence in this matter.

The President pro tempore ruled:

The paper has been admitted as a legitimate piece of evidence. The Chair is of the opinion that everything that is necessary for a proper explanation of the meaning of that paper is competent. What effect it would have upon the respondent is a question of law that would afterwards be determined. But as to the question of the admissibility of the evidence, the Chair is of opinion that whenever there is ambiguity in an instrument which itself is admitted in evidence it is competent to show what those who made the paper intended. How far that would be binding upon the respondent is an altogether different question, and the Chair does not mean in the ruling to rule on that point. That would be a question for the Senate to determine when it comes to consider the weight of the evidence. As to whether or not a partnership has been proven and whether the respondent should be bound by statements made by one who is alleged to be his partner, is a question to be determined by the Senate sitting as a court.

Upon the naked question as to whether or not the paper which is proven to have been executed, and which the Senate has decided to be proper evidence, shall have any ambiguous term explained by showing what the parties to it said it meant, the Chair is not in any doubt whatever.

[6] Third session Sixty-second Congress, Record, p. 226.

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The Impeachment and Trial of Robert W. Archbald [1]

1. Preliminary inquiry and action by House. Section 498.
2. Report of articles of impeachment to House. Section 499.
3. Adoption of articles and election of managers. Section 500.
4. Delivery of impeachment and presentation of articles in the Senate. Section 501.
5. Organization of Senate for trial. Section 502.
6. Process issued. Section 503.
7. Appearance and rules for the trial. Section 504.
8. Answer of respondent. Section 505.
9. Replication of House. Sections 506, 507.
10. Delay of trial. Section 508.
11. Opening statements. Section 509.
12. Presentation of evidence. Section 510.
13. Final arguments. Section 511.
14. Judgment pronounced. Section 512.

498. The impeachment and trial of Robert W. Archbald, United States circuit judge, designated as a member of the Commerce Court.

In response to a resolution of the House, the President transmitted to the Judiciary Committee of the House charges filed against Judge Archbald and all papers relating thereto with a message suggesting that they be not laid before the House until examined by the committee.

Form of resolution instructing the Judiciary Committee to examine the charges against Judge Archbald.

In investigating the conduct of Judge Archbald, the Judiciary Committee by resolution, extended to the accused permission to be present with counsel and cross-examine witness.

On April 23, 1912,[1a] Mr. George W. Norris, of Nebraska, introduced, by delivery to the Clerk, the following resolution:

"*Resolved*, That the President of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charges filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report."

The resolution was referred, under the rule, to the Committee on the Judiciary. On April 25,[2] Mr. Henry D. Clayton, of Alabama,

[1] Cannon's Precedents, vol. 6, p. 684 (1936).
[1a] Second session Sixty-second Congress, Record, p. 5242.
[2] Record, p. 5346.

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from that committee, submitted the report of the committee, with favorable recommendation, and the resolution was unanimously agreed to.

A message from the President in response to this request was laid before the House by the Speaker on May 4,[3] in part as follows:

In reply, I have to state that, in February last, certain charges of improper conduct by the Hon. Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now judge of the Commerce Court, were brought to my attention by Commissioner Meyer of the Interstate Commerce Commission. I transmitted these charges to the Attorney General, by letter dated February 13, instructing him to invesitgate the matter, confer fully with Commissioner Meyer, and have his agents make as full report upon the subject as might be necessary, and, should the charges be established sufficiently to justify proceeding on them, bring the matter before the Judiciary Committee of the House of Representatives.

The Attorney General has made a careful investigation of the charges, and as a result of that investigation has advised me that, in his opinion, the papers should be transmitted to the Committee on the Judiciary of the House to be used by them as a basis for an investigation into the facts involved in the charges. I have, therefore, directed him to transmit all of the papers to the Committee on the Judiciary; but in my opinion—and I think it will prove in the opinion of the committee—it is not compatible with the public interests to lay all these papers before the House of Representatives until the Committee on the Judiciary shall have sifted them out and determined the extent to which they deem it essential to the thoroughness of their investigation not to make the same public at the present time. But all of the papers are in the hands of the committee and, therefore, within the control of the House.

The message was read and, with the accompanying papers, was referred to the Committee on the Judiciary. On the same day Mr. Clayton, from that committee, reported the following resolution, which was agreed to by the House.

Resolved, That the Committee on the Judiciary be, and is hereby, authorized to inquire into and concerning the official conduct of Honorable Robert W. Archbald, formerly district judge of the United States Court for the Middle District of Pennsylvania, and now a judge of the Commerce Court, touching his conduct in regard to the matters and things mentioned in House Resolution numbered five hundred and eleven, and especially whether said judge has been guilty of an impeachable offense, and to report to the House the conclusions of the committee in respect thereto, with appropriate recommendation:

And resolved further, That the Committee on the Judiciary shall have power to send for persons and papers, and to subpœna witnesses and to administer oaths to such witnesses; and for the purpose of making this investigation said committee is authorized to sit during the sessions of this House; and the Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

Preliminary to the investigation thus authorized the committee agreed upon the following program of procedure:[4]

That for the present the committee will hold public hearings, under the authority given by House resolution 524, for the purpose of examining the witnesses in regard to the matters and things mentioned in House resolution 511, which involve the conduct of Hon. Robert W. Archbald, and that in these public hearings where witnesses are examined Judge Archbald may be represented by counsel, if he desires, and that after the chairman of the committee shall have conducted the principal examination of witnesses and asked the members of the committee to ask such questions as their judgment may dictate to be proper, then, with the permission of the committee, counsel for Judge Archbald, if Judge Archbald is desirous to have counsel present, may ask such questions of the witnesses as the committee may deem proper to be asked of the witnesses in such investigation.

[3] Record, p. 5896.
[4] Record, p. 8907.

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Pursuant to this determination, Judge Archbald attended and was represented by counsel, who cross-examined witnesses and submitted briefs, which were considered by the committee.

499. The Archbald impeachment continued.

The committee, empowered to investigate, reported simultaneously resolutions impeaching Judge Archbald and articles of impeachment.

On July 8, 1912, Mr. Clayton, from the Committee on the Judiciary, presented as privileged a unanimous report, which was referred to the House Calendar.[5]

The report, which incorporates findings of fact and conclusions reached by the committee as well as a discussion of the law, nature, and function of impeachment, with citations of authorities relating thereto, concludes:

Your committee reports herewith the accompanying resolution and articles of impeachment against Judge Robert W. Archbald, and recommends that they be adopted by the House and that they be presented to the Senate with a demand for the conviction and removal from office of said Robert W. Archbald, United States circuit judge designated as a member of the Commerce Court:

"*Resolved*, That Robert W. Archbald, additional circuit judge of the United States from the third judicial circuit, appointed pursuant to the act of June 18, 1910 (U. S. Stat. L., vol. 36, 540), and having duly qualified and having been duly commissioned and designated on the 31st day of January, 1911, to serve for four years in the Commerce Court, be impeached for misbehavior and for high crimes and misdemeanors; and that the evidence heretofore taken by the Committee on the Judiciary under House resolution 524 sustains 13 articles of impeachment which are hereinafter set out; and that said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

(Then follow 13 articles of impeachment setting forth the charges in detail.)

500. The Archbald impeachment, continued.

Form of resolution designating managers on the part of the House to conduct the impeachment trial and instructing them to carry the impeachment to the Senate.

The managers elected to conduct the Archbald trial on behalf of the House of Representatives consisted of seven members of the Judiciary Committee and represented both the majority and minority parties in the House.

Form of resolution authorizing the managers to incure necessary expenses in the conduct of the Archbald case.

The report[6] was debated in the House on July 11.[7] At the conclusion of the reading of the report by the Clerk, Mr. James R. Mann, of Illinois, said:

Mr. Speaker, when the report was made by the gentleman from Alabama [Mr. Clayton] it was stated by him, and properly so, that the resolution would be printed separately as any other resolution. The Clerk has read the resolution from the report. The resolution was not printed separately, through some misunderstanding, probably, on the part of the clerk in charge, and I ask unanimous consent that the resolution may be numbered and printed and reported from the committee as of July 8, 1912, in the ordinary form. It seems to me that that is due to the proper procedure in the House.

[5] Record, p. 8705.
[6] Second session Sixty-second Congress, House Report No. 946.
[7] Record, p. 8904.

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There was no objection, and the resolution was ordered printed separately, as of July 8, and numbered H. Res. 622.

After extended debate, the resolution, with the accompanying articles of impeachment, was agreed to, yeas 223, nays 1.

Thereupon, it was:

Resolved, That Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court; that said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Robert W. Archbald of high crimes and misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by this House; and that the said managers do demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and demand his impeachment, conviction, and removal from office.

It was also:

Resolved, That the managers on the part of the House in the matter of the impeachment of Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such expenses as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers, and the managers have power to send for persons and papers.

It was further:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate, and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

The Members so elected were members of the Committee on the Judiciary and represented both the majority and minority parties in the House.

501. The Archbald impeachment, continued.

A message was sent to inform the Senate that the managers on the part of the House of Representatives would present the impeachment of Judge Archbald, and the Senate transmitted a message in reply informing the House that the Senate was ready to receive them.

Forms and ceremonies of presenting the Archbald impeachment at the bar of the Senate.

The articles of impeachment, signed by the Speaker and attested by the Clerk, after being read by the chairman of the managers, were handed to the Secretary of the Senate.

Having carried to the Senate the articles impeaching Judge Archbald, the managers returned and reported verbally in the House.

On July 13[8] (legislative day of July 6), in the Senate, a message

[8] Second session Sixty-second Congress, Record, p. 8989.

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was received from the House of Representatives, delivered by its Chief Clerk, announcing that the House had passed the following resolution:

Resolved, That a message be sent to the Senate to inform them that this House has impeached for high crimes and misdemeanors, Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, and that the House adopted articles of impeachment against said Robert W. Archbald, judge as aforesaid, which the managers on the part of the House have been directed to carry to the Senate; and that Henry D. Clayton, of Alabama; Edwin Y. Webb, of North Carolina; John C. Floyd, of Arkansas; John W. Davis, of West Virginia; John A. Sterling, of Illinois; Paul Howland, of Ohio; and George W. Norris, of Nebraska, Members of this House, have been appointed such managers.

On motion of Mr. Augustus O. Bacon, of Georgia, it was:

Ordered, That the Secretary inform the House of Representatives that the Senate is ready to receive the managers appointed by the House for the purpose of exhibiting articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court, agreeably to the notice communicated to the Senate.

On July 15,[9] at 12 o'clock and 15 minutes p.m., the Assistant Doorkeeper of the Senate announced:

I have the honor to announce the managers on the part of the House of Representatives to conduct the proceedings in the impeachment of Robert W. Archbald, judge of the circuit court and designated a judge of the Commerce Court of the United States.

The President pro tempore said:

The managers on the part of the House will be received, and the Sergeant at Arms will assign them their seats.

The committee from the House of Representatives were escorted by the Sergeant at Arms to seats assigned them in the area in front of the Chair, and Mr. Manager Clayton, its chairman, said:

Mr. President, the managers on the part of the House of Representatives are here present and ready to present the articles of impeachment which have been preferred by the House of Representatives against Robert W. Archbald, a circuit judge of the United States and designated a judge of the Commerce Court of the United States. The House adopted the following resolution, which I will read to the Senate:

By direction of the President pro tempore, the Sergeant at Arms made proclamation as follows:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Robert W. Archbald, circuit judge of the United States and designated a judge of the United States Commerce Court.

Mr. Manager Clayton then read the articles of impeachment, and continued:

And, Mr. President, the House of Representatives by protestation, saving to themselves the liberty of exhibiting at any time hereafter any further articles of accusation or impeachment against the said Robert W. Archbald, a circuit judge of the United States and designated as a judge of the United States Commerce Court, and also of replying to his answers which he shall make unto the articles preferred against him, and of offering proof to the same and every part thereof, and to all and every other article of accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said Robert W. Archbald may be put to answer the high crimes and misdemeanors in office which have been charged against him in the articles which have been exhibited to the Senate, and that such proceedings, examinations, trials, and judgments may be thereupon had and given as may be agreeable to law and justice.

[9] Record, p. 9051.

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Mr. President, the managers on the part of the House of Representatives, in pursuance of the action of the House of Representatives by the adoption of the resolutions and articles of impeachment which have just been read to the Senate, do now demand that the Senate take order for the appearance of said Robert W. Archbald to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The articles of impeachment signed by the Speaker and attested by the Clerk, were handed to the Secretary of the Senate,[10] and the President pro tempore said:

Mr. Chairman and gentlemen of the committee of the House of Representatives, the Chair begs to assure you that the Senate will take order in the matter of the impeachment of Judge Archbald and communicate its action to the House of Representatives.

Mr. Manager Clayton replied:

Mr. President, in behalf of the House of Representatives the managers of the House beg to thank the Presiding Officer and the Senate for the courtesy extended to the managers upon the part of the House of Representatives.

The committee of the House of Representatives then retired from the Chamber.

The committee of the House of Representatives having returned to the Hall of the House, Mr. Clayton submitted as privileged:

Mr. Speaker, as one of the managers, and in behalf of all the managers on the part of the House of the impeachment proceedings, I beg to report to the House that the articles of impeachment prepared by the House of Representatives and preferred against Robert W. Archbald, a United States circuit judge and designated as a judge of the Commerce Court of the United States, have been exhibited and read to the Senate; that the Presiding Officer of that body stated to the managers that the Senate would take order in the premises, and that due notice of the same would be given to the House of Representatives.

502. The Archbald impeachment continued.

The articles of impeachment in the Archbald trial were ordered printed by the Senate and referred to a special committee appointed by the President pro tempore.

In the organization of the Senate for the Archbald trial the oath was administered to the President pro tempore by a Senator designated by order of the Senate for that purpose.

The President pro tempore, after being sworn, administered the oath to the Senators sitting for the trial of Judge Archbald.

The Senate notified the House by message that it was organized for the trial of Archbald impeachment.

The hour prescribed by the rule having arrived, the President pro tempore declared legislative business suspended and the Senate in order to proceed for the impeachment trial.

Whereupon [11] Mr. George Sutherland, of Utah, offered the following order, which was agreed to:

Ordered, That the articles of impeachment presented against Robert W. Archbald be printed for use of the Senate.

The following resolution offered by Mr. Clarence D. Clark, of Wyoming, was also agreed to:

Resolved, That the message of the House of Representatives relating to the impeachment of Robert W. Archbald be referred to a select committee to consist of five Senators to be appointed by the President pro tempore.

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[10] These articles of impeachment appear in full in the Journals of both the House and Senate, in the House Journal on July 11, (p. 854), the day of their adoption, and in the Senate Journal on July 15, (454), the day they were presented and read.

[11] Second session Sixty-second Congress, Senate Journal, p. 628.

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The President pro tempore appointed Messrs. Clarence D. Clark, of Wyoming; Knute Nelson, of Minnesota; William P. Dillingham, of Vermont; Augustus O. Bacon, of Georgia; and Charles A. Culbertson, of Texas, as members of this select committee.

On July 16,[12] at 1 o'clock p. m., the President pro tempore of the Senate announced:

The hour of 1 o'clock has arrived, and in accordance with the rule the legislative business will be suspended, and the Senate will proceed upon the impeachment of Robert W. Archbald.

On motion of Mr. Reed Smoot, of Utah, by unanimous consent, Mr. Shelby M. Cullom, of Illinois, was designated to administer the constitutional oath.

Mr. Cullom administered the oath to the President pro tempore:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial district, designated a judge of the Commerce Court, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

The President pro tempore said:

Without objection, the Chair will suggest that the Secretary will call the roll, calling 10 Senators at a time, and that as their names are called the Senators advance to the desk to have the oath of office administered to them.

Accordingly the roll was called and those Senators present advanced to the desk in groups of 10 and the oath was administered by the President pro tempore to the several groups as called.

The oath having been administered to those present, the names of the absentees were again called, and Senators who had entered the Chamber since the first call advanced to the desk and were sworn.

The President pro tempore announced:

Senators, the Senate is now sitting for the trial of the impeachment of Robert W. Archbald additional circuit judge of the United States for the third judicial district, designated a judge of the United States Commerce Court.

On motion of Mr. Clark, the following resolution was agreed to:

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Robert W. Archibald, United States circuit judge, and is ready to receive the managers on the part of the House at its bar.

A message announcing the passage of this order was delivered in the House by Mr. Crockett, one of the clerks of the Senate.

Mr. Lodge then submitted:

I am about to make a motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock in order to give the managers on the part of the House time to assemble and appear here. Before making the motion, however, I call attention to the fact that the Senate, sitting as a court, when it takes a recess brings the Senate back into legislative session where it was. I now make the motion that the Senate, sitting as a court of impeachment, take a recess until 3 o'clock.

The motion was agreed to, and at 1 o'clock and 45 minutes, p.m., the Senate, sitting as a court of impeachment, took a recess until 3 o'clock

[12] Record, p. 9117.

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p. m., and a message notifying the House of this recess was transmitted [13] to the House.

503. The Archbald impeachment, continued.

The ceremony of formal demand by the managers that process issue in the trial of the Archbald impeachment.

On demand of the managers, the Senate ordered summons to be issued for the appearance of Judge Archbald, fixing the day and hour of return.

The proceedings of the Senate, sitting in the impeachment trial of Judge Archbald, were recorded in a separate journal.

In the meanwhile [14] the resolution notifying the House that the Senate was now organized for the trial was delivered in the House, and, at 3 o'clock and 1 minute p. m., the managers of the impeachment on the part of the House of Representatives appeared at the bar and their presence was announced by the Sergeant at Arms.

The PRESIDENT PRO TEMPORE. The Sergeant at Arms will conduct the managers to the seats provided for them within the bar of the Senate.

The managers were conducted to the seats assigned them within the space in front of the Secretary's desk.

The PRESIDENT PRO TEMPORE. Gentlemen managers, the Senate is now organized for the trial of the impeachment of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court.

Whereupon Mr. Manager Clayton, chairman of the managers on the part of the House, rose and said:

Mr. President, we, as managers on the part of the House of Representatives, are directed by the House of Representatives to appear at the bar of the Senate, which we now do, and demand that process be issued to Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the Commerce Court, and that he be required to answer at the bar of the Senate the said articles of impeachment.

Thereupon Mr. Clark offered the following, which was agreed to by the Senate:

Ordered, That a summons be issued, as required by the Rules of Procedure and Practice in the Senate when sitting for the trial of the impeachment of Robert W. Archbald, returnable on Friday, the 19th day of the present month, at 12:30 o'clock in the afternoon.

Mr. Manager Clayton said:

Mr. President, I beg to say on behalf of the managers on the part of the House of Representatives that they will await the further pleasure of the Senate.

And then, at 3 o'clock and 5 minutes p.m., the managers on the part of the House retired from the Chamber.

On motion of Mr. Clark, the Senate, sitting for the trial of the impeachment, adjourned until Friday, July 19, at 12:30 o'clock in the afternoon. A message advising the House of this action on the part of the Senate was transmitted to the House.

The proceedings of the court of impeachment do not appear in the daily Journal of the Senate but are recorded in a separate journal appended thereto and entitled "Proceedings of the Senate on the Trial of Robert W. Archbald, etc."

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[13] Record, p. 9145.
[14] Second session Sixty-second Congress, Record, p. 9123.

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The Daily Journal of the Senate merely records the announcement of the session of the Senate sitting on the trial, and in each instance concludes:

After proceedings had therein as stated in the record, the Senate resumed its legislative business.

504. The Archbald impeachment trial.

Form of oath of the Sergeant at Arms and form of proclamation opening sessions of the Senate sitting in the impeachment trial of Judge Archbald.

In response to the writ of summons, Judge Archbald appeared in person attended by counsel to answer the articles of impeachment.

In the Archbald trial the Senate adopted orders supplementing the rules of procedure and practice for the Senate when sitting in impeachment trials.

Order of the Senate prescribing method of submitting requests, applications, or objections, and regulating colloquys and questions.

In response to a motion by respondent's counsel that time be allowed to present the answer, the Senate granted 10 days.

On July 19,[15] in the Senate, the following appears:

THE PRESIDENT PRO TEMPORE. The hour of 12:30 o'clock, to which the Senate sitting as a court in the impeachment of Judge Robert W. Archbald adjourned, has arrived. The Sergeant at Arms will make the opening proclamation.

The SERGEANT AT ARMS. Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence on pain of imprisonment while the Senate of the United States is sitting for the trial of the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, designated a judge of the United States Commerce Court.

By direction of the President pro tempore, the names of those Senators who had not been sworn were called. There were no responses.

Mr. Clark offered this resolution, which was agreed to:

Ordered, That the Secretary inform the House of Representatives that the Senate is sitting in its Chamber and ready to proceed with the trial of the impeachment of Robert W. Archbald.

On motion of Mr. Clark, it was:

Ordered, That the Presiding Officer on the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, be, and is hereby, authorized to sign all orders, mandates, writs, and precepts authorized by the Rules of Procedure and Practice in the Senate when sitting on impeachment trials and by the Senate.

At 12 o'clock and 39 minutes p.m. the Assistant Doorkeeper announced the managers on the part of the House, who were conducted to the seats assigned to them in the area in front of the Secretary's desk, on the left of the Chair.

At 12 o'clock and 39 minutes p.m. the respondent, Robert W. Archbald, and his counsel, A. S. Worthington and Robert W. Archbald, jr., entered the Chamber and were conducted to seats assigned them in the space in front of the Secretary's desk on the right of the Chair.

The PRESIDENT PRO TEMPORE. The Secretary will read the Journal of the proceedings of the last session of the Senate while sitting in the trial of the impeachment of Robert W. Archbald.

[15] Second session Sixty-second Congress, Record, p. 9275; Senate Journal, p. 629.

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The Secretary read the Journal of proceedings of the Senate sitting for the trial of the impeachment of Tuesday, July 16, 1912.

By direction of the President pro tempore, the Secretary read the following return appended to the writ of summons and administered the following oath to the Sergeant at Arms:

"I, Daniel M. Ransdell, Sergeant at Arms of the Senate of the United States, do solemnly swear that the return made by me upon the process issued on the 16th day of July, 1912, by the Senate of the United States, against Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge in the Commerce Court, is truly made, and that I have performed such service therein described. So help me, God."

Whereupon the Sergeant at Arms made proclamation:

Robert W. Archbald! Robert W. Archbald! Robert W. Archbald, circuit judge of the United States and designated as a judge of the United States Commerce Court: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The President pro tempore announced:

Counsel for the respondent are informed that the Senate is now sitting for the trial of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the Commerce Court, upon articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Worthington, of counsel for the respondent, entered formal appearance, which was read by the Secretary and ordered placed on file.

Mr. Worthington then submitted a motion on behalf of the respondent praying that time be granted in which to prepare an answer to the articles of impeachment.

On motion of Mr. Clark, of Wyoming, amended by motion of Mr. Porter J. McCumber, of North Dakota, and further modified on suggestion of Mr. Henry Cabot Lodge, of Massachusetts, it was:

Ordered, That the respondent present the answer to the articles of impeachment at 12 o'clock and 30 minutes post meridian on Monday, the 29th day of July, 1912.

The following orders were then severally agreed to:

Ordered, That the managers on the part of the House be allowed until the 1st day of August, 1912, at 1 o'clock in the afternoon, to present a replication, or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 4th day of August, 1912.

Ordered, That in all matters relating to the procedure of the Senate, sitting in the trial of the impeachment of Robert W. Archbald, circuit judge of the United States, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request or objection, the same shall be addressed directly to the Presiding Officer, and not otherwise.

It shall not be in order for any Senator to engage in colloquy or to address questions either to the managers on the part of the House or the counsel for the respondent, nor shall it be in order for Senators to address each other, but they shall address their remarks directly to the Presiding Officer.

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Ordered, That the proceedings of the Senate sitting in the trial of impeachment of Robert W. Archbald be printed daily for the use of the Senate as a separate document.

And then, at 1 o'clock and 10 minutes p.m., the Senate, sitting for the trial of the impeachment, adjourned, and the managers on the part of the House and the respondent and his counsel withdrew from the Chamber.

505. The Archbald impeachment continued.

The answer of Judge Archbald to the articles of impeachment was signed by himself and his counsel.

The answer in the Archbald case was read by the Secretary of the Senate.

The answer of Judge Archbald demurred severally to all the articles of impeachment, alleging that no impeachable offense had been charged and then replying in detail to the charges set forth in each article.

The managers were not supplied with a copy of the answer of Judge Archbald at the time of filing.

On July 29 [16] the Senate, at the appointed hour, discontinued its legislative business, and the session for the impeachment proceedings was opened with the usual proclamation by the Sergeant at Arms.

The oath was administered to certain Senators not previously sworn.

The managers, and the respondent with his counsel, having attended, the President pro tempore directed the Journal of the last session's proceedings to be read. The Journal having been approved, Mr. Worthington presented the respondent's answer, consisting of a separate demurrer and answer to each of the 13 articles of impeachment, which was read by the Secretary.

This answer of respondent appears in full in the Journal.[17]

At the conclusion of the reading Mr. Manager Clayton inquired if the counsel could furnish the managers on the part of the House of Representatives with a copy of this answer by the respondent to the articles of impeachment.

Mr. Worthington, of counsel for the respondent, replied:

Mr. President, I regret to say that we had obtained a copy for that purpose, but different newspapers and press associations exhausted the copies, even our own office copy. Otherwise we should be very happy to hand a copy to the managers.

And then, on motion of Mr. Lodge, at 2 o'clock and 5 minutes p.m., the Senate, sitting on the trial of impeachment, adjourned until Thursday, August 1, 1912, at 1 o'clock, p.m.

506. The Archbald impeachment continued.

An attested copy of Judge Archbald's answer, having been messaged to the House by the Senate, was referred to the managers.

The managers having prepared a replication to the answer of Judge Archbald, submitted it to the House for approval and adoption.

The House notified the Senate by message that it had adopted a replication in the Archbald trial and had authorized its managers to file with the Secretary of the Senate any further pleading deemed necessary.

[16] Second session Sixty-second Congress, Senate Journal, p. 630; Record, p. 9795.
[17] Senate Journal, pp. 630–639.

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On July 31,[18] in the House, the Speaker announced the reference to the managers on the part of the House of Representatives of an attested copy of the answer of Robert W. Archbald to the articles of impeachment messaged to the House from the Senate on the previous day.

Mr. Manager Clayton said:

Mr. Speaker, I am directed by my associate managers on the part of the House to say that the managers were furnished on yesterday with a certified copy of the answer of Judge Archbald, additional circuit judge for the first judicial circuit, designated a judge in the Commerce Court.

And I am further directed to say that the managers have considered the answer in the matter of the impeachment proceedings against Judge Archbald and have directed me to present to the House, and ask its adoption, the replication [19] to such answer, and I ask that the Clerk read the replication, which I send to the desk.

The Clerk read the replication. On motion of Mr. Manager Clayton, the replication was unanimously adopted.

Mr. Manager Clayton then offered the following resolution, which was agreed to:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit, and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

507. The Archbald impeachment, continued.

The replication in the Archbald trial was presented by the managers and read by the Secretary of the Senate.

The replication of the House to the answer of Judge Archbald was submitted without signature.

The replication of the House consisted of a general denial of all allegations set forth in Judge Archbald's answer and an averment that the charges contained in the articles of impeachment set forth impeachable offenses.

On August 1 [20] the Senate went into session for the trial in the usual form.

The President pro tempore laid before the Senate a message received from the House of Representatives, which was read by the Secretary, as follows:

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted a replication to the answer of Robert W. Archbald, additional circuit judge of the United States for the third judicial circuit and designated a judge of the United States Commerce Court, to the articles of impeachment exhibited against him, and that the same will be presented to the Senate by the managers on the part of the House; and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary.

Mr. Manager Clayton said:

Mr. President, on behalf of the House of Representatives and on behalf of the managers of the House of Representatives I now present the replication of the

[18] Second session Sixty-second Congress, House Journal, p. 910; Record, p. 9954.
[19] House Report No. 1119.
[20] Second session Sixty-second Congress, Senate Journal, p. 688; Record, p. 9983.

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House of Representatives to the answers made by Robert W. Archbald, United States circuit judge for the third judicial circuit and designated a judge of the United States Commerce Court. The replication is to the answer of the respondent. I ask that it be read by the Secretary.

The replication was read by the Secretary and ordered to be printed.

Mr. Manager Clayton then submitted the following order for adoption by the Senate.

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

Mr. Worthington, of counsel for the respondent, objected:

The President, as far as I know, it is unprecedented to ask the court to fix a time for the trial of a case until it is at issue. By an order which has heretofore been made by the Senate it is provided that after this replication shall have been filed further pleadings on either side may be filed with the Secretary of the Senate, the pleadings to be closed by next Saturday. Having heard the replication read. I am quite clear that it will be necessary to file a further pleading on behalf of the respondent in order to have this case in such shape that it can be legally determined. So far as we are concerned, I think that further pleading may in all probability be filed certainly by 12 o'clock to-morrow.

I would respectfully suggest that it is not in order to fix a time for the trial until what is to be tried in fixed by the pleadings in the case.

Upon further argument by Mr. Manager Clayton and Mr. Worthington—

The PRESIDENT PRO TEMPORE. The Chair will be glad to submit any motion which counsel for the respondent may make.

Mr. WORTHINGTON. The rule which you have adopted would permit counsel for the respondent or the managers to make orally any request for an order, but it must be reduced to writing if required.

I make orally the motion that the question of fixing a date for the trial be postponed until the court convenes on Saturday next.

After further discussion, Mr. Thomas S. Martin, of Virginia, suggested that the managers on the part of the House permit consideration of their motion to go over until Saturday, August 1.

The President pro tempore submitted:

Counsel on the part of the respondent asks that the consideration of the question as to when the trial shall be proceeded will be postponed for determination until Saturday. Is there objection? If not, by unanimous consent it is so ordered. Is there any other matter the managers on the part of the House desire to present?

Mr. Manager CLAYTON. There is nothing else, Mr. President, and having no other business before the Senate, we beg leave at this time to retire.

Thereupon the managers and respondent, with his counsel, withdrew and adjournment was taken until August 3, at 2 o'clock p.m.

508. The Archbald impeachment, continued.

Counsel for Judge Archbald having elected not to plead further notified the managers by letter of that decision.

In response to an objection by the managers to the designation "board of" managers, contained in a communication incorporated in the record of proceedings, the Secretary of the Senate was authorized to correct the designation.

In the Archbald trial the Senate provided that lists of witnesses to be subpoenaed should be furnished by managers or counsel to the Sergeant at Arms and that additional witnesses desired later should be subpoenaed on application to the Presiding Officer.

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The Senate considered in secret session a motion by the managers fixing the date on which the Archbald trial should be opened.

The Senate declined to grant the motion of the managers, submitted August 3, that the trial of Judge Archbald begin August 7, and, on motion of a Senator, set the opening of the trial for December 3.

On August 3,[21] a letter addressed to Mr. Manager Clayton by Mr. Worthington, of counsel for the respondent, was, by request of Mr. Worthington, seconded by Mr. Manager Clayton, read and incorporated in the record as follows:

WASHINGTON, D. C., *August 2, 1912.*

Hon. HENRY D. CLAYTON,
Chairman Board of Managers in the matter of the impeachment of Robert W. Archbald.

DEAR SIR: Inasmuch as counsel for Judge Archbald have decided not to file any further pleadings in his case, it is due to the board of managers that I should notify them of that fact and inform them why counsel have changed their minds on this subject since the argument in the Senate yesterday.

In the respondent's first answer to each of the articles of impeachment he avers in substance that the article does not set forth an impeachable offense. In the first paragraph of the replication filed on behalf of the House of Representatives issue was joined on these answers. But as to whole of the sixth article and as to part of the thirteenth article the respondent pleads in substance that even if the article sets forth an impeachable offense it sets it forth in such general and indefinite terms that the respondent should not be called upon to answer it. And as to the thirteenth article, the plea is made that it is bad because it undertakes to charge in one article two separate and distinct offenses.

We do not find in the replication any distinct reference to either of these two last-mentioned defenses, relating one to both the sixth and the thirteenth articles and the other to the thirteenth article alone. It was our impression yesterday that for this reason some further pleading would be necessary on our part as to these two matters. However, as you stated in the Senate yesterday that it is the understanding of the board of managers that their replication is a denial of all of our allegations as to the insufficiency of the articles of impeachment, whether on one ground or another, counsel for the respondent have decided that they will accept this construction of the replication made by the board of managers. This being so, no further pleading seems to be necessary, and we will be ready, when the Senate meets to-morrow, to take up the question of the date of trial.

Yours, very truly,

A. S. WORTHINGTON,
Of Counsel for Respondent.

Thereupon Mr. Manager Clayton said:

Mr. President, I do not desire to be hypercritical of the language employed by the counsel, but so far as my investigation goes, I am led to understand that the managers of the House have never before been spoken of as a board of managers. I therefore ask the counsel to strike from his letter the words "board of" wherever they occur. We are not a board of managers. We are managers on the part of the House of Representatives; and while not a purist, not a hairsplitting dealer in technicalities, I think it is proper that in papers of this character and of this solemnity the usual forms be followed.

The PRESIDENT PRO TEMPORE. The Secretary will make the correction.

On request of Mr. Manager Clayton, the order pending before the Senate at adjournment was reported. On motion of Mr. Manager Clayton, the order was amended to read as follows:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpœnaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

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[21] Second session Sixty-second Congress, Senate Journal, p. 638; Record, p. 10132.

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And further ordered, That in case hereafter the managers or the respondent may desire the attendance of additional witnesses, in such case the managers or the respondent may have the witness or witnesses desired subpœnaed, in accordance with the practice and usage of the Senate, upon application in such form as may be approved by the Presiding Officer.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 7th day of August, 1912.

The PRESIDENT PRO TEMPORE. The Presiding Officer would inquire whether the counsel for the respondent desires to submit any order.

Mr. WORTHINGTON. No, Mr. President.

After argument by Mr. Manager Clayton and Mr. Worthington on the adoption of the order as amended, Mr. Clark, of Wyoming, submitted:

Mr. President, anticipating that the decision of this matter will lead to some debate, and as under the rules it must be considered behind closed doors, I move that the doors be closed for the purpose of deliberation.

The motion was agreed to, and the President pro tempore directed the Sergeant at Arms to clear the galleries and close the doors. The managers and the respondent, with his counsel, withdrew, and at 4 o'clock and 30 minutes p.m., the doors were closed until 5 o'clock and 32 minutes p. m., when the doors were reopened.

The managers on the part of the House and the respondent, accompanied by counsel, entered the Chamber and took the seats assigned them.

Mr. Jacob H. Gallinger, of New Hampshire, offered the following order:

Ordered, That lists of witnesses be furnished the Sergeant at Arms by the managers and the respondent, who shall be subpoenaed by him to appear at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Ordered, That the cause shall be opened and the trial proceeded with at 12 o'clock and 30 minutes postmeridian on the 3d day of December, 1912.

Mr. Henry L. Meyers, of Montana, offered the following as a substitute for the order submitted by Mr. Gallinger:

Ordered, That the trial of the accused under these impeachment proceedings and charges be, and is hereby, set for the 15th day of August, 1912, at 12:30 p.m., and that orders for witnesses be filed on or before August 10, 1912, and thereafter as the Senate may order.

The order submitted by the managers on the part of the House of Representatives was also read. The pending question was then put by the President pro tempore, as follows:

The several orders are before the Senate for consideration. Under the view taken by the Presiding Officer, the question should first be put on the order fixing the most distant time. That is in accordance with parliamentary procedure and also in accordance with such procedure as might be considered proper in a court. The order proposed by the Senator from New Hampshire, Mr. Gallinger, is the one which fixes the longest period, and the vote will first be taken upon that. The rule [23] of the Senate requires that the vote shall be taken by yeas and nays. It is therefore not necessary that the yeas and nays should be ordered as in other instances. As Senators' names are called, those who favor the date fixed by the order proposed by the Senator from New Hampshire will vote "yea." Those who are opposed to that date and favor other dates will as their names are called, vote "nay." The Secretary will call the roll.

The roll being called, it was decided in the affirmative, yeas 44, nays 19, and the order submitted by Mr. Gallinger was agreed to.

[23] Standing Rules of the Senate, Rule V, p. 174.

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The managers on the part of the House thereupon retired from the Chamber.

The Senate sitting for the trial of the impeachment continued in session and considered briefly a matter of procedure [23] relating to the trial.

Following the disposition of the question of procedure, the respondent retired from the Chamber, and the Senate, sitting for the trial of the impeachment adjourned until Tuesday, December 3, at 12:30 o'clock p.m.

509. The Archbald impeachment, continued.

The opening addresses in the Archbald trial were regulated by order of the Senate.

Managers and counsel made extended opening statements in the Archbald trial, the managers outlining charges which they proposed to establish and counsel for the respondent setting forth the contention that impeachment could be sustained only on conviction of offenses punishable in criminal court and controverting charges preferred in the articles of impeachment.

On December 3, 1912,[24] Mr. Worthington introduced Mr. Alexander Simpson, jr., of the Philadelphia bar, as associate counsel for the respondent.

The following orders were severally agreed to:

Ordered, That the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall, unless otherwise ordered, commence at 2 o'clock in the afternoon.

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

Upon suggestion of Mr. Manager Clayton and Mr. Worthington, respectively, it was agreed that the managers on the part of the House of Representatives and the respondent and his counsel should, during the remainder of the proceedings, appear without the formality of an announcement.

Mr. Manager Clayton opened the case for the House of Representatives as follows:

Mr. President, as I understand the action of the Senate, it contemplated that at this time the managers should proceed to make a statement embodying the facts upon which the articles of impeachment are predicated in this case.

Mr. Manager Clayton then proceeded with a statement of what the managers proposed to prove.

He was followed by Mr. Worthington, who said:

Mr. President and Senators, for the first time in an impeachment trial in this tribunal the opening statement for the respondent is to be made at the beginning of the case instead of at the close of the testimony on behalf of the managers. We have desired to do this and are doing it with the acquiescence of the honorable managers for two reasons. One is that the Members of the Senate may know when the introduction of testimony is going on what are the questions of fact in dispute. The other is that Senators may know from the beginning what we rely upon as the law of the case.

Mr. Worthington then stated the contention of counsel on behalf of the respondent, that Judge Archbald could be properly convicted in impeachment proceedings only when convicted of an offense punish-

[23] See section 7714, Chapter CXCI in this volume.
[24] Third session Sixty-second Congress, Senate Journal, p. 317; Record, p. 21.

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able in a criminal court, and controverted and discussed in detail allegations contained in the charges preferred in the articles of impeachment.

In reply to an allusion made by Mr. Worthington in discussing the theory that impeachment could be only for indictable offenses, Mr. Manager Clayton said by way of rebuttal:

Mr. President, in reply to the complaint which has been made by the honorable gentleman who represents the respondent that we did not go into the discussion of the law in the preliminary statement which the managers had the honor to submit this afternoon, I beg to say that we followed what we believed to be the practice in such cases. I have before me the record in the case of Judge Swayne. I observe that Judge Palmer, who was then the manager speaking for all the managers, after he concluded his statement of facts, winding up, with a condensed summary of all the statements which he had made at length, ended the preliminary statement of facts which is required according to the rules and practice of the Senate. He did not at that time present any brief or any argument or any views on the law of impeachment. The managers, Mr. President, have already prepared in a formal way a brief, and can present that brief, and in argument fully cover their views as to the law of impeachment; but we thought that this brief and what the managers said last summer, which is in the Record and to which I have referred, would amply apprise the honorable counsel for the respondent of the line of argument on the law in this case that the managers would pursue.

On December 5,[25] on motion of Mr. John D. Works, of California, it was—

Ordered, That such briefs and citations of authorities as have already been prepared by the managers on the part of the House and counsel for the respondent be filed with the Secretary and printed in the Record for the immediate use of Senators.

510. The Archbald impeachment, continued.

The presentation of evidence in the Archbald trial.

Instances wherein the Senate by order restricted the number of character witnesses which might be called to testify.

An instance in which the Senate by order disregarded an established rule of evidence.

On December 4,[26] following the reading and approval of the Journal, the names of witnesses on behalf of the managers were read to ascertain their presence, and the introduction of testimony on behalf of the managers began.

This presentation of testimony continued on December 5, 6, 7, 9, 10, 11, 12, and was concluded on December 14, when Mr. Manager Clayton announced that examination in chief had been concluded.

The introduction of testimony on behalf of the respondent was begun on December 16 and continued until December 19, when adjournment was taken until January 3, 1913.

On December 17,[27] following the introduction of a number of witnesses called by counsel on behalf of the respondent to testify as to respondent's character, Mr. Manager Clayton said:

Mr. President, the managers have offered no character witnesses anywhere in these proceedings; it is not their purpose to offer any character witnesses. Ten character witnesses have been examined. The rule adopted, or the practice I may say, to be more accurate, in all the courts of justice so far as I know is that the court has the discretionary power to limit the number of witnesses as to character.

[25] Record, p. 151.
[26] Third session Sixty-second Congress, Record, p. 98.
[27] Record, p. 774.

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I take it that that power is an inseparable incident of the court to regulate its proceedings and for the purpose, among others, of bringing the trial to an end.

In so far as I know, all courts permit a reasonable number of witnesses to be examined on character; but where the testimony of the character of the party is not controverted, the court has always, after a reasonable number of witnesses have been examined, held that no more should be examined on that particular matter. Some of the courts of the Union hold that four character witnesses are sufficient where the testimony of those witnesses is not controverted.

So, Mr. President, I respectfully submit to you and to the Senate that after these gentlemen have examined 10 witnesses on character and when the testimony of those character witnesses is not disputed—is not controverted—and when the managers tell the Senate it will not be controverted, it seems to me that the further examination of character witnesses might well be dispensed with.

The Presiding Officer said:

The Chair recognizes, of course, that the practice is such as the manager has indicated, and the necessity of it is apparent. Otherwise the time of a court might be indefinitely taken up through the introduction of innumerable witnesses. At the same time the Chair recognized that in this case the character of the respondent is necessarily in issue, and on account of the gravity of the case and the peculiar position which the Presiding Officer holds, simply as the mouthpiece of the Senate, the Chair does not feel authorized to take the responsibility of shutting off the respondent in the proof which he seeks to make upon this line. The Senate has full control over the matter whenever it sees proper to exercise it.

Thereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the number of character witnesses shall be limited to 15.

On December 18,[28] on cross-examination, Mr. Manager Webb proposed to interrogate Miss Mary F. Boland, a witness called in behalf of the respondent, about certain matters relative to a conversation which had not been referred to in the examination in chief. Objection by counsel for the respondent was sustained by the presiding officer.

The PRESIDING OFFICER. The rule is plain that the counsel can only cross-examine the witness about matters upon which the witness has been interrogated on direct examination.

Whereupon, on motion of Mr. James A. Reed, of Missouri, it was—

Ordered, That the witness now on the stand, Miss Mary F. Boland, be at this time interrogated by the managers relative to that part of the conversation sought to be elicited.

511. The Archbald impeachment, continued.

In the impeachment trial of Judge Archbald the respondent took the stand and testified in his own behalf.

No rebuttal evidence was offered by the managers in the Archbald trial.

The Senate limited the time of the final arguments in the impeachment trial of Judge Archbald.

The order in which closing arguments in the Archbald trial should be made was arranged by stipulation between managers and counsel.

The Senate permitted argument in manuscript to be filed with the reporter and included in the printed report of the proceeding.

Counsel having withheld remarks from the record in violation of the rule, the managers called attention to the infraction and asked that the rule be enforced.

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[28] Third session Sixty-second Congress, Senate Journal, p. 322; Record, p. 841.

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The Senate fixed the time at which a final vote should be taken on the articles of impeachment presented against Judge Archbald and notified the House by message.

The voting on the articles in the Archbald impeachment was without debate but each Senator was permitted to file an opinion to be published in the printed proceedings.

The presentation of testimony on behalf of the respondent was resumed on January 3, 1913, and continued on January 4 and January 6, and concluded on January 7. On the last two days the respondent was called to the stand in person by counsel and testified in his own behalf,[29] being cross-examined by the managers and answering numerous questions propounded by Senators in writing. No rebuttal evidence was presented by the managers.

The taking of evidence having been concluded on both sides, on suggestion of the managers, all witnesses summoned on behalf of either side were finally discharged.

On motion of Mr. Reed Smoot, of Utah, it was:

Ordered, That hereafter the daily sessions of the Senate sitting in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall commence at 1 o'clock in the afternoon and shall continue until 6 o'clock p.m.; that the time for final argument of the case shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

On January 8[30] agreement between managers and counsel for the respondent as to order in which argument should be made was indicated by Mr. Worthington, as follows:

Mr. President, I may say it is entirely agreeable to counsel for the respondent. We have had some conference with the managers about it, and we understand that all the managers who are to speak, except the one who is to make the closing argument, will speak before we begin.

The following orders were severally agreed to:

Ordered, That the time for final arguments in the trial of impeachment of Robert W. Archbald, additional circuit judge of the United States, shall be limited to three days from and including January 8, 1913, and shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, the time thus assigned to each side to be divided as each side may for itself determine.

Ordered, That any of the managers or counsel for the respondent having all or any portion of his argument in manuscript may deliver a copy of the same to the Reporter or any portion thereof, which for lack of time or to save the time of the Senate the managers or counsel shall omit to deliver or read, and the same shall be incorporated by the Reporter as a part of the argument delivered, and any manager or counsel who does not address the court may file and have printed as a part of the proceedings an argument before the close of the discussion.

Mr. Manager Sterling, on behalf of the managers, began the argument in support of the articles of impeachment, and was followed by Messrs. Manager Webb and Manager Floyd. Mr. Manager Howland also addressed the Senate and had not concluded at adjournment. On January 9[31] Mr. Manager Howland concluded his argument, and

[29] This is apparently the only instance in which a respondent in an impeachment case before the Senate has taken the stand in his own behalf.
[30] Third session Sixty-second Congress, Senate Journal, p. 325; Record, p. 1208.
[31] Record, p. 1258.

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Messrs. Manager Norris and Manager Davis continued for the managers.

Mr. Simpson then opened the argument on behalf of the respondent, and was followed by Mr. Worthington, who concluded his argument on January 10.[32] Mr. Worthington was followed by Mr. Manager Clayton, who closed the argument on behalf of the managers.

At the conclusion of the argument, Mr. Reed, proposed to submit to the respondent for answer the following question which he sent to the desk in writing:

You have testified that you were in doubt with reference to the proper construction to be placed upon the testimony of Mr. Compton, and that thereupon you wrote a letter to Helm Bruce, the attorney, asking him for his construction of the evidence; and you have further stated that you attached the reply written by Helm Bruce to the record. It appears in the original record that in the sentence which appears in typewriting, "We did apply it there," an alteration is made by pen and ink, a caret being inserted between the words "did" and "apply," and a line is drawn from the caret to the margin, and the word "not" written. Did you make this alteration?

On motion of Mr. Clark, of Wyoming, the doors were closed for deliberation. After one hour and four minutes the doors were reopened, and the President pro tempore announced that the Senate in private conference had determined that the question should not be asked. Mr. Reed withdrew the request.

On January 11,[33] upon the approval of the minutes, Mr. Clark, of Wyoming, moved that the doors be closed for deliberation on the parts of the Senators, and the question was put, when Mr. Manager Clayton said:

Before the motion is announced as having been carried, I will state that I submitted a communication to the President of the Senate this morning directing attention to what I think is an infraction of the rules of the Senate on the part of Mr. Worthington, of counsel for the respondent, who has withheld his remarks from the Record.

Mr. President, everyone else printed his remarks when those remarks were completed without withholding them, and I know of no rule of any court which permits this to be done. Against that, Mr. President, I desire to say that I think it is improper. I have called the attention of the Presiding Officer to that fact, and I hope that the order made in this case will be observed.

Mr. Worthington said:

I have only to say, Mr. President, that after the late hour when we adjourned here last night, as soon as possible I got to work at the manuscript which had been forwarded to me and continued to work on it until midnight. I was then told that it was too late to get it in the Record of to-day.

I was not aware of any rule of the Senate which prevented this from being done, and I observed I think that the remarks of one of the managers, Mr. Manager Howland, had been withheld.

To which Mr. Manager Clayton rejoined:

Mr. President, may I not make, with the permission of the Senator, another suggestion? The manager who is now addressing you remained at his office last night until the hour of 12:30 in order to read the manuscript of the report of his remarks made here yesterday, made after the gentleman who has just addressed you made his. And it will be borne in mind that Mr. Worthington made part of his argument day before yesterday.

Mr. President, it seems to me that in all fairness and due observance of this rule his remarks should have been in the Record this morning. This manager, who labored under greater disadvantage than he did, has put his in the Record this morning.

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[32] Record, p. 1329.
[33] Record, p. 1385.

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Mr. Frank B. Brandegee, of Connecticut, having made the point of order that the motion to close the doors is not debatable, the President pro tempore said:

The Chair withheld the announcement of the vote out of courtesy to the manager on the part of the House of Representatives, which the Chair supposed would meet with the acquiescence and approval of the Senate. Strictly, of course, the order to close the doors ought to have been made, but this was the only opportunity, and the manager on the part of the House of Representatives, in the opinion of the Chair, was entitled to that courtesy. The Chair will now, however, declare that the motion of the Senator from Wyoming is carried, and the Sergeant at Arms is directed to clear the galleries and close the doors.

The doors having been reopened, on motion of Mr. Clark of Wyoming, it was severally:

Ordered, That on Monday, January 13, 1913, at the hour of 1 o'clock p. m., a final vote be taken on the articles of impeachment presented by the House of Representatives against Robert W. Archbald, additional circuit judge of the United States.

Ordered, That the Secretary of the Senate do acquaint the House of Representatives that the Senate sitting as a High Court of Impeachment will on Monday, the 13th day of January instant, at the hour of 1 o'clock, p. m., proceed to pronounce judgment on the articles of impeachment exhibited by the House of Representatives against Robert W. Archbald.

Mr. Elihu Root of New York then submitted the following:

Ordered, That upon the final vote in the pending case each Senator may, in giving his vote, state his reasons therefor, occupying not more than one minute, which reason shall be entered in the Journal in connection with his vote; and each Senator may, within two days after the final vote, file his opinion, in writing, to be published in the printed proceedings in the case.

Mr. McCumber. I move to amend the proposed order by striking out the first of it, relating to the one-minute explanation of a vote, so that the latter portion may still stand.

The amendment was agreed to, yeas 40, nays 31, and the order as amended was unanimously adopted.

512. The Archbald impeachment, continued.

Forms of voting on the articles and declaring the results in the Archbald impeachment.

The Presiding Officer announced the result of the vote on each article of the Archbald impeachment and the conviction or acquittal of respondent on each.

The respondent, who had attended throughout the Archbald trial, was represented by counsel, but not present at the time of rendering judgment.

Having found Judge Archbald guilty, the Senate proceeded to pronounce judgment of removal and disqualification.

The Presiding Officer held that the question on removal and disqualification was divisible.

Form of judgment pronounced by the Presiding Officer in the Archbald case.

The Archbald trial being concluded, the Senate, on motion, adjourned without day.

No report, on the conclusion of the Archbald trial, was made to the House by the managers, but the Senate, by message, announced the judgment.

On January 13,[34] the President pro tempore announced that the time had arrived for the consideration of the impeachment. Mr. Worthing-

[34] Third session Sixty-second Congress, Senate Journal, p. 326; Record, p. 1438.

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ton, Mr. Robert W. Archbald, jr., and Mr. Martin, of counsel for the respondent, and the managers on the part of the House of Representatives appeared in the seats provided for them.

The Sergeant at Arms made the usual proclamation and the Journal was read and approved.

On motion of Mr. Root, it was:

Ordered, That upon the final vote in the pending impeachment the Secretary shall read the articles of impeachment successively, and when the reading of each article is concluded the Presiding Officer shall state the question thereon as follows:

"Senators, How say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator as his name is called shall arise in his place and answer "guilty" or "not guilty."

Several Senators were by unanimous consent excused from voting on plea of having been unavoidably detained from the Senate during a portion of the trial or having come into the Senate since the beginning of the trial. Other Senators were excused from voting on those articles specifying offenses occurring prior to appointment of the respondent as circuit judge, expressing themselves as entertaining doubts as to his impeachability for offenses committed in an office other than that he held at time of impeachment. Mr. Benjamin R. Tillman, of South Carolina, was excused from voting on all save the first count. The Speaker pro tempore, as presiding officer, was also excused from voting except in the case of an article where his vote would affect the result.

By direction of the President pro tempore, the first article of impeachment was read.

The PRESIDENT PRO TEMPORE.

The Chair now submits article 1 to the judgment of the Senate.

Senators, how say you? Is the respondent, Robert W. Archbald, guilty or not guilty as charged in this article? The Secretary will call the roll of the Senate for the separate response of each Senator.

The roll was called and the President pro tempore announced:

It appears from the response given by Senators that 68 Senators voted guilty and 5 Senators have voted not guilty. More than two-thirds of the Senators having voted guilty, the Senate adjudges the respondent, Robert W. Archbald, guilty as charged in the first article of impeachment.

The Secretary proceeded to read the second article, when Mr. Hoke Smith, of Georgia, moved that the Senate close the doors and go into secret session.

Mr. CULBERSON. Mr. President, a point of order. The Senate has already decided to vote at this hour on the articles of impeachment.

The President pro tempore said:

That is true; and in the absence of any order to the contrary, that order would undoubtedly be carried out. It is, however, for the Senate to determine whether it will at any time suspend that order. It is not a matter of unanimous consent, but it is an order which can be changed or not changed, as the Senate may see proper to do.

Pending the vote, Mr. Worthington inquired:

Mr. President, before the question is put, I ask, if the motion be carried, whether it will result in excluding counsel for the respondent from the Senate Chamber?

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The PRESIDENT PRO TEMPORE. Yes; it would, while the Senate was in secret deliberation, exclude everybody except Senators and those who are privileged under such circumstances.

Mr. WORTHINGTON. I trust that nothing will be done which will exclude counsel for the respondent while the vote is being taken.

The PRESIDENT PRO TEMPORE. There will be no vote taken in secret session; there can not be. The question is on the motion of the Senator from Georgia [Mr. Smith], to now close the doors.

Thereupon Mr. Smith withdrew his motion.

The remaining articles of impeachment were read by the Secretary, and at the conclusion of the reading of each article the roll was called. After each roll call the vote was recapitulated and the President pro tempore announced the result.

The results were as follows:

	Guilty	Not guilty
Article 1	68	5
Article 2	46	25
Article 3	60	11
Article 4	52	20
Article 5	66	6
Article 6	24	45
Article 7	29	36
Article 8	22	42
Article 9	23	39
Article 10	1	65
Article 11	11	51
Article 12	19	46
Article 13	42	20

At the conclusion of the voting Mr. James A. O'Gorman, of New York, presented the following:

Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

A division being demanded, the first portion of the order was agreed to.

The question being taken on the second portion of the order, it was decided in the affirmative—yeas 39, nays 35. So the order was adopted.

The President pro tempore thereupon pronounced the judgment of the Senate as follows:

The Senate therefore do order and decree, and it is hereby adjudged, that the respondent Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be, and he is hereby, removed from office; and that he be and is hereby forever disqualified to hold and enjoy any office of honor, trust, or profit under the United States.

On motion of Mr. Gallinger, it was:

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

Whereupon, on motion of Mr. Gallinger, the Senate, sitting for the trial of the article of impeachment against Robert W. Archbald, adjourned without day.

On January 14, in the House, a message was received from the Senate, by one of its clerks, announcing that the Senate had passed the following order:

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Ordered, That the respondent, Robert W. Archbald, circuit judge of the United States from the third judicial circuit, and designated to serve in the Commerce Court, be removed from office and be forever disqualified from holding and enjoying any office of honor, trust, or profit under the United States.

Resolved, That the Secretary be directed to communicate to the President of the United States and to the House of Representatives the foregoing order and judgment of the Senate and transmit a certified copy of the same to each.

No report was made by the managers to the House.

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The Impeachment and Trial of Harold Louderback [1]

1. Preliminary inquiry by the House. Section 513.
2. Appointment of managers. Section 514.
3. Presentation of articles and postponement of trial. Section 515.
4. Organization of Senate for trial. Section 516.
5. Changes in managers. Section 517.
6. Answer and motion to make more definite. Section 518.
7. Adoption of rules. Section 519.
8. Amendment of articles. Section 520.
9. Answer of respondent to amended articles. Section 521.
10. The replication of the House. Section 522.
11. Presentation of testimony. Section 523.
12. Arguments and judgment. Section 524.

513. The impeachment and trial of Harold Louderback, Judge of the Northern District of California.

Instances wherein the local bar association initiated proceedings by recommending impeachment.

The impeachment proceedings were set in motion through a resolution introduced by delivery to the Clerk and referred to the Committee on the Judiciary.

Form of resolution authorizing investigation with a view to impeachment.

On May 26, 1932,[2] Mr. Fiorello H. LaGuardia, of New York, introduced, by delivery at the Clerk's desk, the following resolution (H. Res. 329):

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, the same to be designated by the chairman of said committee, be, and is hereby, authorized and directed to inquire into the official conduct of Harold Louderback, a district judge of the United States District Court for the Northern District of California, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harold Louderback has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D. C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the session of the House and until adjournment of the first session of the Seventy-second Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

[1] Cannon's Precedents, vol. 6, p. 709 (1936).
[2] First session Seventy-second Congress, Record, p. 11358.

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Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The resolution was referred to the Committee on the Judiciary, which reported it back on May 31 [3] with the conclusion that—

the committee feels that under the circumstances the matter of Judge Louderback's conduct should be investigated.

On June 9,[4] on motion of Mr. Hatton W. Sumners, of Texas, from the Committee on the Judiciary, by unanimous consent, the House proceeded to the consideration of the resolution and after brief debate agreed to it without division.

Mr. Sumners included as a part of his remarks a letter from the Bar Association of San Francisco reciting certain occurrences leading up to the proposal of impeachment as follows:

SAN FRANCISCO, CALIF., *May 24, 1932.*

JUDICIARY COMMITTEE,
House of Representatives, Washington, D.C.

SIRS: Under date of May 2, 1932, the Bar Association of San Francisco addressed a communication to His Excellency Herbert Hoover, President of the United States, with reference to certain matters published in the press of San Francisco concerning Hon. Harold C. Louderback, judge of the United States district court at San Francisco, Calif., accompanying said communication with clippings from San Francisco newspapers.

Under date of May 9, 1932, we received an acknowledgment of said communication from Mr. Lawrence Richey, Secretary to the President, stating that the matter "is being referred for consideration of the Attorney General," and thereafter we received a letter dated May 12, 1932, from Mr. Charles P. Sisson, Assistant Attorney General, stating in effect that our letter addressed to the President had been referred to the Department of Justice for consideration, and further stating "that the Department of Justice has no jurisdiction whatsoever over the United States judges. Criticisms of Federal judges are ordinarily addressed to the Judiciary Committee of the House of Representatives."

Pursuant to the suggestion contained in the letter from the Assistant Attorney General, we are hereby addressing your honorable committee and forwarding copies of the above-mentioned correspondence, together with duplicate press clippings, for such action as your committee may deem proper.

We feel certain that you will readily realize that the interest of the Bar Association of San Francisco in this matter is solely a public one and that it is concerned only in preserving the integrity of the bench, public confidence in, and respect for, the courts and the due administration of justice. We believe that no department of the Government should occupy a higher position in the public mind, or performs a more important function, than that of the courts, and that it is of the utmost importance they shall be maintained on a plane of the strictest honesty and efficiency and shall be above suspicion. Charges against a court or judge, especially when publicly made, require thorough investigation, not only in the interest of the public and report for our judicial system but also in the interest of the incumbent.

If your committee should undertake an investigation of the matters in question, our association will cheerfully render such assistance as is within its power, in the hope that whatever the outcome may be the result will contribute to the maintenance of public confidence in our courts.

Respectfully submitted.

BAR ASSOCIATION OF SAN FRANCISCO,
By RANDOLPH V. WHITING, *President.*

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[3] House report No. 1461.
[4] Record, p. 12470.

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514. The special committee authorized to conduct the investigation held hearings at which Judge Louderback appeared in person and by counsel.

A resolution proposing abatement of impeachment proceedings was held to be of high privilege.

The member reporting a bill from a committee is entitled to recognition when the bill is taken up for consideration in the House.

The House, disregarding the majority report of the committee, adopted the minority recommendation and passed articles of impeachment.

The House by resolution elected five managers, chosen from the Committee on the Judiciary and from both parties, to carry the impeachment of Judge Louderback to the Senate.

Pursuant to the terms of the resolution, a special committee was appointed by the Chairman of the Committee on the Judiciary, from the membership of the committee, consisting of Mr. Sumners, Mr. Tom D. McKeown, of Oklahoma, Mr. Gordon Browning, of Tennessee, Mr. Leonidas C. Dyer, of Missouri, and Mr. LaGuardia.

The special committee held hearings in San Francisco the week of September 6, 1932, at which Judge Louderback was presented by counsel, and in Washington, January 16 and 17, at which he appeared in person.

The special committee then submitted a divided report to the Committee on the Judiciary.

On February 17, 1933,[5] Mr. McKeown, by direction of the Committee on the Judiciary, presented a report to the effect that the special committee authorized to conduct the investigation had transmitted its conclusions to the Committee on the Judiciary, and that after consideration of the findings—

> The committee censures the judges for conduct prejudicial to the dignity of the judiciary in appointing incompetent receivers, for the method of selecting receivers, for allowing fees that seem excessive, and for a high degree of indifference to the interest of litigants in receiverships.

The committee, however, did not consider the circumstances sufficient flagrant to warrant impeachment and recommended the adoption of this resolution:

> *Resolved*, That the evidence submitted on the charges against Honorable Harold Louderback, district judge for the northern district of California, does not warrant the interposition of the constitutional powers of impeachment of the House.

The minority dissented from the majority recommendation and, after summarizing the several charges of misconduct involved, proposed articles of impeachment.

On February 24, 1933,[6] Mr. Sumners, who had submitted minority views, rising in the House, asked whether he as Chairman of the Committee on the Judiciary or the Member reporting the resolution by direction of the committee, was entitled to recognition to debate it.

The Speaker[7] replied:

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[5] H. Rept. No. 2065.
[6] Second session Seventy-second Congress, Record, p. 4913.
[7] John N. Garner, of Texas, Speaker.

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The usual custom is that the Member who has been directed by the committee to report the bill and who reports the legislation coming before the House is the one the Chair recognizes.

Whereupon, the Speaker recognized Mr. McKeown, who called up the resolution reported by the committee.

Mr. Bertrand H. Snell, of New York, inquired whether a resolution of this character could be considered as privileged.

The Speaker replied that, inasmuch as it related to the abatement of impeachment proceedings, it was of the highest privilege.

In the course of the debate on the resolution, Mr. LaGuardia offered the following as a substitute:

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239 sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office as United States district judge for the northern district of California on April 17, 1928.

(The substitute then set forth the articles of impeachment proposed by the minority.)

After extended debate, the substitute was agreed to on a yea and nay vote, and on February 27,[8] on motion of Mr. Sumners, it was—further:

Resolved, That Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of this House, be, and they are hereby, appointed managers to conduct the impeachment against Harold Louderback, United States district judge for the northern district of California; and said managers are hereby instructed to appear before the Senate of the United States and at the bar thereof in the name of the House of Representatives and of all the people of the United States to impeach the said Harold Louderback of misdemeanors in office and to exhibit to the Senate of the United States the articles of impeachment against said judge which have been agreed upon by the House; and that the said managers do demand the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and demand his impeachment, conviction, and removal from office.

Of the five managers thus selected to conduct the impeachment proceedings on behalf of the House, three were of the majority party, two were of the minority, and all were members of the Committee on the Judiciary.

515. The ceremonies of presenting to the Senate the articles of impeachment.

The impeachment proceedings having been presented in the Senate during the closing days of the Seventy-second Congress, were made the special order for the first day of the first session of the succeeding Congress.

A decision holding that a motion relating to a question of the Senate sitting as a court of impeachment is not debatable.

The Senate having been informed, on February 28,[9] by message, of the action [10] of the House of Representatives, transmitted to the House on the same day [11] a message announcing its readiness to receive the

[8] Second session Seventy-second Congress, Record, p. 5177.
[9] H. Res. 403, Record, p. 5178.
[10] Record, p. 5193.
[11] Record, p. 5195.

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managers appointed by the House for the purpose of exhibiting the articles of impeachment.

On March 3,[12] the managers on the part of the House appeared before the Senate and were received with the formalities customarily observed on such occasions.

Mr. Manager Summers read the resolution [13] agreed to by the House appointing its managers, and yielded to Mr. Manager Browning, who read the articles of impeachment, as follows:

ARTICLES OF IMPEACHMENT AGAINST HAROLD LOUDERBACK

CONGRESS OF THE UNITED STATES OF AMERICA,

IN THE HOUSE OF REPRESENTATIVES,

February 24, 1933.

Resolution

Resolved, That Harold Louderback, who is a United States district judge of the northern district of California, be impeached of misdemeanors in office; and that the evidence heretofore taken by the special committee of the House of Representatives under House Resolution 239, sustains five articles of impeachment, which are hereinafter set out; and that the said articles be, and they are hereby, adopted by the House of Representatives, and that the same shall be exhibited to the Senate in the following words and figures, to wit:

Articles of impeachment of the House of Representatives of the United States of America in the name of themselves and of all of the people of the United States of America against Harold Louderback, who was appointed, duly qualified, and commissioned to serve during good behavior in office, as United States district judge for the northern district of California, on April 17, 1928.

ARTICLE I

That the said Harold Louderback, having been nominated by the President of the United States, confirmed by the Senate of the United States, duly qualified and commissioned and while acting as a district judge for the northern district of California did on divers and various occasions so abuse the power of his high office, that he is hereby charged with tyranny and oppression, favoritism and conspiracy, whereby he has brought the administration of justice in said district in the court of which he is a judge into dispute, and by his conduct is guilty of misbehavior, falling under the constitutional provision as ground for impeachment and removal from office.

In that the said Harold Louderback or about the 13th day of March, 1930, at his chambers and in his capacity as judge aforesaid, did willfully, tyrannically, and oppressively discharge one Addison G. Strong, whom he had on the 11th day of March, 1930, appointed as equity receiver in the matter of Olmsted against Russell-Colvin Co. after having attempted to force and coerce the said Strong to appoint one Douglas as attorney for the receiver in said case.

In that the said Harold Louderback improperly did attempt to cause the said Addison G. Strong to appoint the said Douglas Short as attorney for the receiver by promises of allowance of large fees and by threats of reduced fees did he refuse to appoint said Douglas Short.

In that the said Harold Louderback improperly did use his office and power of district judge in his own personal interest by causing the appointment of the said Douglas Short as attorney for the receiver, at the instance, suggestion or demand of one Sam Leake, to whom the said Harold Louderback was under personal obligation, the said Sam Leake having entered into a certain arrangement and conspiracy with the said Harold Louderback to provide him, the said Harold Loulerback, with a room at the Fairmont Hotel in the city of San Francisco, Calif., and made arrangements for registering said room in his, Sam Leake's name and paying all bills therefor in cash under an arrangement with

[12] Record, p. 5473.
[13] H. Res. 402, Record, p. 5177.

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the said Harold Louderback, to be reimbursed in full or in part in order that the said Harold Louderback might continue to actually reside in the city and county of San Francisco after having improperly and unlawfully established a fictitious residence in Contra Costa County for the sole purpose of improperly removing for trial to said Contra Costa County a cause of action which the said Harold Louderback expected to be filed against him; and that the said Douglas Short did receive large and exorbitant fees for his services as attorney for the receiver in said action, and the said Sam Leake did receive certain fees, gratutities, and loans directly or indirectly from the said Douglas Short amounting approximately to $1,200.

In that the said Harold Louderback entered into a conspiracy with the said Sam Leake to violate the provisions of the California Political Code establishing a residence in the county of Contra Costa when the said Harold Louderback in fact did not reside in said county and could not have established a residence without the concealment of his actual residence in the county of San Francisco, covered and concealed by means of the said conspiracy with the said Sam Leake, all in violation of the law of the State of California.

In that the said Harold Louderback, in order to give cover to his fictitious residence in the county of Contra Costa, all for the purpose of preparing and falsely creating proof necessary to establish himself as a resident of Contra Costa County in anticipation of an action he expected to be brought against him, for the sole purpose of meeting the requirements of the Code of Civil Procedure of the State of California providing that all causes of action must be tried in the county in which the defendant resides at the commencement of the action, did in accordance with the conspiracy entered into with the said Sam Leake unlawfully register as a voter in said Contra Costa County, when in law and in fact he did not reside in said county and could not so register, and that the said acts of Harold Louderback constitute a felony defined by section 42 of the Penal Code of California.

Wherefore the said Harold Louderback was and is guilty of a course of conduct improper, oppressive, and unlawful and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

Article II

That Harold Louderback, judge as aforesaid, was guilty of a course of improper and unlawful conduct as a judge, filled with partiality and favoritism in improperly granting excessive, exorbitant, and unreasonable allowances as disbursements to one Marshall Woodward and to one Samuel Shortridge, jr., as receiver and attorney, respectively, in the matter of the Lumbermen's Reciprocal Association.

And in that the said Harold Louderback, judge as aforesaid, having improperly acquired jurisdiction of the case of the Lumbermen's Reciprocal Association contrary to the law of the United States and the rules of the court did, on or about the 29th day of July, 1930, appoint one Marshall Woodward and one Samuel Shortridge, jr., receiver and attorney, respectively, in said case, and after an appeal was taken from the order and other acts of the judge in said case to the United States Circuit Court of Appeals for the Ninth Circuit and the said order and acts of the said Harold Louderback having been reversed by said United States Circuit Court of Appeals and the mandate of said circuit court of appeals directed the court to cause the said receiver to turn over all of the assets of said association in his possession as receiver to the commissioner of insurance of the State of California, the said Harold Louderback unlawfully, improperly, and oppressively did sign and enter an order so directing the receiver to turn over said property to said State commissioner of insurance but improperly and unlawfully made such order conditional that the said State commissioner of insurance and any other party in interest would not take an appeal from the allowance of fees and disbursements granted by the said Harold Louderback to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, thereby improperly using his said office as a district judge to favor and enrich his personal and political friends and associates to the detriment and loss of litigants in his, said judge's court, and forcing said State commissioner of insurance and parties in interest in said action unnecessary delay, labor, and expense in protecting the rights of all parties against such arbitrary, improper, and unlawful order of said judge; and that the said Harold Louderback did improperly

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and unlawfully seek to coerce said State commissioner of insurance and parties in interest in said action to accept and acquiesce in the excessive fees and the exorbitant and unreasonable disbursements granted by him to said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, and did improperly and unlawfully force and coerce the said parties to enter into a stipulation modifying said improper and unlawful order and did thereby make it necessary for the State commissioner of insurance to take another appeal from the said arbitrary, improper, and unlawful action of the said Harold Louderback.

In that the said Harold Louderback did not give his fair, impartial, and judicial consideration to the objections of the said State commissioner of insurance against the allowance of excessive fees and unreasonable disbursements to the said Marshall Woodward and Samuel Shortridge, jr., receiver and attorney, respectively, in the case of the Lumbermen's Reciprocal Association, in order to favor and enrich his friends at the expense of the litigants and parties in interest in said matter, and did thereby cause said State commissioner of insurance and the parties in interest additional delay, expense, and labor in taking an appeal to the United States Circuit Court of Appeals in order to protect their rights and property in the matter against the partial, oppressive, and unjudicial conduct of said Harold Louderback.

Wherefore, said Harold Louderback was and is guilty of a course of conduct oppressive and unjudicial and is guilty of misbehavior in office as such judge and was and is guilty of a misdemeanor in office.

Article III

The said Harold Louderback, judge aforesaid, was guilty of misbehavior in office resulting in expense, disadvantage, annoyance, and hindrance to litigants in his court in the case of the Fageol Motor Co., for which he appointed one Guy H. Gilbert receiver, knowing that the said Gilbert was incompetent, unqualified, and inexperienced to act as such receiver in said case.

In that the said Harold Louderback, judge as aforesaid, oppressively and in disregard of the rights and interests of litigants in his court did appoint one Guy H. Gilbert as receiver for the Fageol Motor Co., knowing the said Guy H. Gilbert to be incompetent, unfit, and inexperienced for such duties, and did refuse to grant a hearing to the plaintiff, defendant, creditors, and parties in interest in the matter of the Fageol Motor Co. on the appointment of said receiver, and the said Harold Louderback did cause said litigants and parties in interest in said matter to be misinformed of his action while said Guy H. Gilbert took steps necessary to qualify as receiver, thereby depriving said litigants and parties in interest of presenting the facts, circumstances, and conditions of the said equity receivership, the nature of the business and the type of person necessary to operate said business in order to protect creditors, litigants, and all parties in interest, and thereby depriving said parties in interest of the opportunity of protesting against the appointment of an incompetent receiver.

Wherefore the said Harold Louderback was and is guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was and is guilty of a misdemeanor in office.

Article IV

That the said Harold Louderback, judge aforesaid, was guilty of misbehavior in office, filled with partiality and favoritism, in improperly, willfully, and unlawfuly granting on insufficient and improper papers an application for the appointment of a receiver in the Prudential Holding Co. case for the sole purpose of benefiting and enriching his personal friends and associates.

In that the said Harold Louderback did on or about the 15th day of August, 1931, on insufficient and improper application, appoint one Guy H. Gilbert receiver for the Prudential Holding Co. case when as a matter of fact and law and under conditions then existing no receiver should have been appointed, but the said Harold Louderback did accept a petition verified on information and belief by an attorney in the case and without notice to the said Prudential Holding Co. did so appoint Guy H. Gilbert the receiver and the firm of Dinkelspiel and Dinkelspiel attorneys for the receiver; that the said Harold Louderback in an attempt to benefit and enrich the said Guy H. Gilbert and his attorneys, Dinkelspiel and Dinkelspiel, failed to give his fair, impartial, and judicial consideration to the application of the said Prudential Holding Co. for a dismissal of the petition and a discharge of the receiver, although the said Prudential Holding Co. was in

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law entitled to such dismissal of the petition and discharge of the receiver; that during the pendency of the appliction for the dismissal of the petition and for the discharge of the receiver a petition in bankruptcy was filed against the said Prudential Holding Co. based entirely and solely on an allegation that a receiver in equity had been appointed for the said Prudential Holding Co., and the said Harold Louderback then and there willfully, improperly, and unlawfully, sitting in a part of the court to which he had not been assigned at the time, took jurisdiction of the case in bankruptcy and though knowing the facts in the case and of the application then pending before him for the dismissal of the petition and the discharge of the equity receiver, granted the petition in bankruptcy and did on the 2d day of October, 1930, appoint the same Guy H. Gilbert receiver in bankruptcy and the said Dinkelspiel and Dinkelspiel attorneys for the receiver, knowing all of the time that the said Prudential Holding Co. was entitled as a matter of law to have the said petition in equity dismissed; in that through the oppressive, deliberate, and willful action of the said Harold Louderback acting in his capacity as a judge and misusing the powers of his judicial office for the sole purpose of benefiting and enriching said Guy H. Gilbert and Dinkelspiel and Dinkelspiel, did cause the said Prudential Holding Co. to be put to unnecessary delay, expense, and labor and did deprive them of a fair, impartial, and judicial consideration of their rights and the protection of their property, to which they were entitled.

Wherefore the said Harold Louderback was, and is, guilty of a course of conduct constituting misbehavior as said judge and that said Harold Louderback was, and is, guilty of a misdemeanor in office.

ARTICLE V

That Harold Louderback, on the 17th day of April, 1928, was duly appointed United States district judge for the northern district of California, and has held such office to the present day.

That the said Harold Louderback as judge aforesaid, during his said term of office, at divers times and places when acting as such judge, did so conduct himself in his said court and in his capacity as judge in making decisions and orders in actions pending in his said court and before him as said judge, and in the method of appointing receivers and attorneys for receivers, in appointing incompetent receivers, and in displaying a high degree of indifference to the litigants in equity receiverships, as to excite fear and distrust and to inspire a widespread belief in and beyond said northern district of California that causes were not decided in said court according to their merits, but were decided with partiality and with prejudice and favoritism to certain individuals, particularly to receivers and attorneys for receivers by him so appointed, all of which is prejudicial to the dignity of the judiciary.

All to the scandal and disrepute of said court and the administration of justice therein.

Wherefore the said Harold Louderback was, and is, guilty of misbehavior as such judge and of a misdemeanor in office.

[SEAL.]

JNO. N. GARNER,
Speaker of the House of Representatives,

Attest:

SOUTH TRIMBLE, *Clerk.*

Mr. Manager Sumners then entered a reservation of the right to exhibit at any time thereafter any further articles of accusation or impeachment, and made formal announcement that the managers on the part of the House of Representatives—

do now demand that the Senate take order for the appearance of said Harold Louderback to answer said impeachment, and do now demand his impeachment, conviction, and removal from office.

The Vice President responded:

The Chair will state to the managers on the part of the House that the Senate will take proper order on the subject of impeachment, of which due notice shall be given to the House of Representatives.

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On motion of Mr. George W. Norris, of Nebraska, the articles of impeachment were ordered printed for the use of the Senate.

Mr. Norris further submitted:

Mr. President, under the Rules of the Senate governing impeachment trials, it would be the duty of the Senate to-morrow at 1 o'clock to organize itself into a court and take the necessary oath, and then proceed with the trial.

It is evident that we shall not be able to comply with the rules now, because this session of Congress will adjourn at 12 o'clock to-morrow, and therefore I ask unanimous consent that the further consideration of the impeachment charges presented by the managers on the part of the House of Representatives be deferred until 2 o'clock on the first day of the first session of the Seventy-third Congress.

The Vice President submitted the request to the Senate, when Mr. Huey P. Long, of Louisiana, objected.

Thereupon, Mr. Norris moved that the impeachment proceedings be made the special order for 2 o'clock on the first day of the first session of the Seventy-third Congress.

Mr. Henry F. Ashurst, of Arizona, addressed the Chair and asked for recognition to debate the motion.

The Vice President held that inasmuch as the motion related to a question of the Senate sitting as a Court of Impeachment, it was not debatable, and recognized all who addressed themselves to the question by unanimous consent only.

Discussion by consent having been concluded, the motion was agreed to; the managers on the part of the House withdrew; and the Senate proceeded to its legislative business.

516. The organization of the Senate for the impeachment trial of Judge Louderback.

A Senator was designated by resolution to administer the oath to the Presiding Officer, who in turn administered the oath simultaneously to all Senators standing in their places.

Certain Senators on their statements were excused from participation in the impeachment proceedings.

Various Senators were excused from voting on a part or all of the articles of impeachment.

On March 9, 1933,[14] the Senate, sitting as a Court of Impeachment, met at 2 o'clock p.m. under its previous order.

On motion of Mr. Norris, Mr. William F. Borah, of Idaho, was designated by the Senate to administer the oath to the presiding officer of the Court of Impeachment.

Mr. Borah administered the oath to the Vice President as follows:

You do solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, a district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

Mr. Borah then announced:

Mr. President, I want to make a personal statement before the oath is taken. I feel that I ought not to sit in this matter by reason of some things which transpired at the time of the appointment of Judge Louderback. The question which I wish to submit now is, Should I make that excuse definite at this time or will it be proper after the oath is taken?

Mr. Ashurst suggested:

[14] First session, Seventy-third Congress, Record, p. 47.

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In my judgment, such statement should be made after Senators shall have taken the oath as members of the court; only the court should excuse Senators from duties to be performed in the court. Care should be taken as to establishing precedents. In strict practice, under the English procedure and under the American procedure, there is no such thing as an impeachment juror or Senator escaping from his responsibility to compose the court. Indeed, in the Andrew Johnson impeachment case, Senator Ben F. Wade, then the President pro tempore, who would have become President had the impeachment succeeded, was asked to stand aside, but it was determined that there was no way by which he, Senator Wade, could be disqualified, and thus made to stand aside. But I am sure, if a Senator should declare that he is disqualified, he could not and should not be required to hear evidence or to render a verdict.

Mr. Hiram W. Johnson, of California, dissented and said:

Mr. President, in order that the matter may be brought to a head, I ask unanimous consent of those who sit here as a court of impeachment or are about to take the oath as jurors or Senators in the court of impeachment, that I be permitted to stand aside in this trial. There are certain incidents which have occurred which, in my opinion, render it improper that I should sit as a judge in this case. I do not wish to detail them, of course, because I feel that in the detailing of them I might do or say something which ought not to be done or said. But while certain of myself, Mr. President, perhaps feeling that I might lean backward one way or the other in a case of this sort, I do not think that I ought to sit in the case, and I ask unanimous consent of the Senate that I may stand aside in the trial of Harold Louderback about to begin.

The question being put, there was no objection and the Vice President announced that the Senator from California was excused.

A similar request by Mr. Borah was agreed to.

Subsequently,[15] Mr. John H. Overton, of Louisiana, requested:

Mr. President, I wish to make a statement. I was a Member of the House of Representatives at the time the articles of impeachment were preferred against Judge Louderback. I voted against the impeachment. I thought that matter should be tendered to the Chair and Members of the Senate before the court convened; but other Senators occupy the same position that I occupy and I wished to consult with them before making the statement. After consulting with them and consulting with some senior Senators who are experienced in such matters, I have come to the conclusion that under all the circumstances it would be proper that I ask to be excused from sitting as a member of the court which I accordingly do.

The request was granted.

Requests by Mr. Augustine Lonergan,[16] of Connecticut, and Mr. William H. Dieterich,[17] of Illinois, to be excused for the same reason were likewise agreed to.

Thereupon the Vice President said:

Will members of the court permit the Chair to make a statement? The Chair presided in the House at the time impeachment proceedings were considered by that body. The Chair did not have occasion to vote or in any way express himself concerning the merits of the case. The Chair thought that members of the court ought to know the situation so that if they have any doubt as to the qualifications of the Chair to act as the presiding officer of the court, they may act accordingly.

There was no response.

On May 23,[18] at the conclusion of the testimony in the trial, Mr. Royal S. Copeland, of New York, submitted:

Mr. President, on account of illness, I have been away from the Chamber for a number of days. I have heard none of the testimony, and feel myself incompetent either to vote or to continue as a member of the court. Therefore I ask

[15] First session, Seventy-third Congress, Record, p. 49.
[16] Record, p. 49.
[17] Record, p. 1469.
[18] Record, p. 3994.

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unanimous consent that I may be excused from further attendance and from voting in the Impeachment Court.

The request being submitted to the Senate by the Presiding Officer, there was no objection, and Mr. Copeland was excused.

On the succeeding day [19] and following the deliberative session of the Senate immediately preceding the vote on the articles of impeachment, Mr. Carter Glass, of Virginia, requested:

Mr. President, on the advice of the distinguished chairman of the Judiciary Committee, the Senator from Arizona, Mr. Ashurst, I am taking the first and last opportunity to say that I shall ask the Senate to excuse me from voting on these various articles of impeachment, for the reason that other public duties have made it impossible for me to be present and hear more than fragments of the testimony adduced in this proceeding and none of the arguments presented. Therefore I feel that under my oath I am not so advised as to be able to render a verdict as a juror, and I shall ask the Senate to excuse me from voting.

There being no objection, the Senator was excused from voting on the impeachment.

At this stage of the proceedings, by unanimous consent, Mr. Thomas P. Gore, of Oklahoma, was also excused from voting, on account of unavoidable absence, and Mr. Henrik Shipstead, of Minnesota, and Mr. Edward P. Costigan, of Colorado, were excused from voting on the first four articles.

On motion of Mr. Joseph T. Robinson, of Arkansas, by unanimous consent, the oath was administered simultaneously to all the Senators present as follows:

You do each solemnly swear that in all things appertaining to the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, now pending, you will do impartial justice according to the Constitution and laws. So help you God.

On motion of Mr. Norris it was—

Ordered, That the Secretary notify the House of Representatives that the Senate is now organized for the trial of articles of impeachment against Harold Louderback, United States district judge for the northern district of California, and is ready to receive the managers on the part of the House at its bar.

On March 13, 1933,[20] at the hour previously designated for the court to assemble, the Senate sitting as a Court of Impeachment convened; by unanimous consent, the journal of the court was considered as read and approved; the managers of the impeachment on the part of the House of Representatives appeared, were announced, and conducted to the seats assigned them; and proclamation of the sitting of the court was made by the Sergeant at Arms.

Mr. Ashurst announced that if it met with the approval of the managers on the part of the House he proposed to submit the following:

Ordered, That a summons be issued as required by the rules of procedure and practice in the Senate, when sitting for the trial of the impeachment against Harold Louderback, United States district judge for the northern district of California, returnable on Tuesday, the 11th day of April, 1933, at 12:30 o'clock in the afternoon.

Mr. Manager Sumners, speaking for the managers, approved the form of the order and it was agreed to.

517. Managers of an impeachment being no longer Members of the House by reason of the expiration of their terms, successors were elected.

[19] Record, p. 4082.
[20] Record, p. 260.

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Discussion of the power of the House to appoint managers to continue in office in that capacity after the expiration of the term for which they were elected to the House.

A resolution providing for the selection of managers of an impeachment was admitted as a matter of privilege.

Instance wherein the number of managers of an impeachment was increased after the institution of proceedings in the Senate.

On March 22,[21] Mr. Manager Sumners, rising in the House, offered this resolution:

Whereas in the Seventy-second Congress, on 27th day of February, 1933, Hatton W. Sumners, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U. S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, United States district judge for the northern district of California.

Mr. Edward W. Goss, of Connecticut, submitted a parliamentary inquiry as to the privilege of the resolution.

The Speaker held it to be privileged.

Mr. Robert Luce, of Massachusetts, raised a question as to the power of the House to appoint managers beyond the term of their office as Representatives.

In reply, Mr. Sumners said:

My judgment, after careful examination, is that the House of Representatives may appoint managers who can continue after the expiration of the term which that House has been elected.

I want to be very candid with the House. I am anxious to go as far as we may safely go toward establishing a precedent in that direction. We find upon examination of the Constitution that there lie between the provisions of the Constitution spaces that have to be filled in either by judicial construction or by precedent. Only precedent can occupy the space, for instance, which lies between the provision granting to the House—not as a part of the Congress, however—the power to originate and prosecute impeachment and that great constitutional guaranty of a speedy trial. Judicial construction may not enter there. We barely escaped a very difficult situation in this case. As the Members of the House here present who were Members of the preceding House will remember, this impeachment was sent to the Senate near the expiration of the Seventy-second Congress. If the Congress had not been called into extraordinary session, in the absence of any recognized right on the part of a House to empower managers to proceed after the expiration of that House, this judge would have rested under impeachment for a year, without possibility of trial, notwithstanding the general principles which run through our whole system of giving the right of speedy trial. Not only is the duty to make effective to the individual a great constitutional right but there is involved a great public interest. Precedents are not unakin to legislative enactments. When established they come to have the force of law. It is as much a duty to set helpful and proper precedents as it is to make wise and helpful laws. I am anxious to go as far in this instance as we may safely go in establishing a proper and helpful precedent.

Mr. Bertrand H. Snell, of New York, questioned the right of the House to extend the powers or privileges of such managers, or other

[21] Record, p. 768.

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appointees, beyond the life of the House itself, and after debate, Mr. Sumners withdrew the resolution and reintroduced it in this form:

Whereas in the Seventy-second Congress on the 27th day of February, 1933, Hatton W. Sumner, Gordon Browning, Malcolm C. Tarver, Fiorello H. LaGuardia, and Charles I. Sparks, Members of the House of Representatives, were appointed managers on the part of the House of Representatives to conduct the impeachment against Harold Louderback, a United States district judge for the northern district of California; and

Whereas the said LaGuardia and Sparks are no longer Members of the House of Representatives:

Resolved, That Randolph Perkins and U.S. Guyer, Members of the House of Representatives, be, and they are hereby, appointed in lieu of the said LaGuardia and Sparks to serve with the said Hatton W. Sumners, Gordon Browning, and Malcolm C. Tarver as the managers on the part of the House of Representatives to conduct the impeachment pending in the United States Senate against Harold Louderback, a United States district judge for the northern district of California.

The resolution as revised was agreed to; the Clerk was directed to notify the Senate; and on the motion of Mr. Sumner, it was further—

Resolved, That the managers on the part of the House in the matter of the impeachment of Harold Louderback, United States district judge for the northern district of California, be, and they are hereby, authorized to employ legal, clerical, and other necessary assistants and to incur such experience as may be necessary in the preparation and conduct of the case, to be paid out of the contingent fund of the House on vouchers approved by the managers; and the managers have power to send for persons and papers, and also that the managers have authority to file with the Secretary of the Senate, on the part of the House of Representatives, any subsequent pleadings which they shall deem necessary: *Provided*, That the total expenditures authorized by this resolution shall not exceed $3,230.25, being the amount of the unexpended balance of $5,000 authorized to be expended by the special committee designated under authority of House Resolution 239, Seventy-second Congress, first session, approved June 9, 1932, to inquire into the official conduct of said Harold Louderback.

On March 27,[22] the Chair laid before the House the following communication:

HOUSE OF REPRESENTATIVES,
Washington, D.C., March 27, 1933.

Hon. HENRY T. RAINEY,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. RAINEY: I hereby submit my resignation as one of the managers on the part of the House in the pending impeachment proceedings against Harold Louderback, a United States judge for the northern district of California.

Yours truly,

M. C. TARVER.

The resignation was accepted, and on April 3,[23] a resolution offered by Mr. Sumners, as privileged, was agreed to and messaged to the Senate as follows:

Whereas Malcolm C. Traver, on the 27th day of March, 1933, submitted to the House of Representatives his resignation as a manager on the part of the House in the pending impeachment against Harold Louderback, a district judge of the United States for the northern district of California, which resignation on said date was accepted by the House of Representatives,

Resolved, That J. Earl Major and Lawrence Lewis, Members of the House of Representatives, be, and they are hereby, appointed managers on the part of the House of Representatives, with the managers on the part of the House heretofore appointed and acting, to conduct the impeachment pending in the United

[22] Record, p. 876.
[23] Record, p. 1155.

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States Senate against Harold Louderback, a district judge of the United States for the northern district of California.

518. The respondent having waived personal service, the oath was not administered to the Sergeant at Arms on the return of the writ.

Form of proclamation by the Sergeant at Arms calling Judge Louderback to appear and answer the articles of impeachment.

Judge Louderback appeared in person, attended by counsel, to answer the articles.

The answer of Judge Louderback to the articles of impeachment.

A motion entered by respondent to make more definite and certain an article of the articles of impeachment was agreed to by the managers on the part of the House without action by the Senate.

Allowance of time in which to file pleadings.

On April 11,[24] the managers on the part of the House were received in the Senate with the usual formalities and the respondent, Harold Louderback, and his counsel, James M. Hanley, Esq., and Walter H. Linforth, Esq., appeared and were conducted to the seats assigned to them in the space in front of the Secretary's desk on the right of the Chair.

Mr. Ashurst offered the following resolution:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

Whereas on March 13, 1933, John N. Garner, Vice President and President of the Senate, acting under authority of the Senate, sitting as a Court of Impeachment, and in accordance with the Rules for Impeachment Trials, issued a writ of summons to Harold Louderback, United States district judge for the northern district of California, commanding him to appear before the Senate of the United States of America at their Chamber in the city of Washington on the 11th day of April, 1933, at 12:30 o'clock afternoon, to answer to articles of impeachment exhibited against him by the House of Representatives of the United States of America, and addressed to Chesley W. Jurney, Sergeant at Arms of the Senate, a precept commanding him to serve true and attested copies of said writ of summons and precept upon the said Harold Louderback personally or by leaving same at his usual place of abode or at his usual place of business; and

Whereas since the recess of the Senate, sitting as a Court of Impeachment, the said Chesley W. Jurney, as Sergeant at Arms, acting upon a suggestion of the Committee on the Judiciary of the Senate, with a view to securing a waiver of personal service of said writ of summons as required by the precept, communicated by telegraph with the said Harold Louderback, who consented to such waiver, and who subsequently forwarded to said Chesley W. Jurney, as Sergeant at Arms, a waiver, in writing, of personal service of said writ of summons, signed by him and witnessed on the 28th day of March, 1933, agreeing voluntarily to appear in person before the Senate of the United States at the time and place specified in said writ of summons and acknowledging receipt of true and attested copies of said writ of summons and precept, transmitted to him by the said Chesley W. Jurney, Sergeant at Arms: Now, therefore, be it

Resolved, That the action of the said Chesley W. Jurney, Sergeant at Arms of the Senate, in securing waiver of personal service of said writ of summons upon the said Harold Louderback be, and the same is hereby, ratified and approved; that the delivery, by registered mail, of true and attested copies of the said writ of summons and precept to the said Harold Louderback, and his acceptance thereof, be deemed and taken to have been a satisfactory and sufficient compliance by the said Chesley W. Jurney, Sergeant at Arms, with the said precept, and that the said Chesley W. Jurney, as Sergeant at Arms, be, and he is hereby, authorized to make return of said writ of summons and precept accordingly.

[24] Record, p. 1462.

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The resolution having been agreed to, the Secretary, by direction of the Vice President, read the return of the Sergeant at Arms to the summons as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS.

The foregoing writ of summons, addressed to Harold Louderback, and the foregoing precept, addressed to me, were duly served upon the said Harold Louderback by the transmittal, by registered mail, to the said Harold Louderback of true and attested copies of the same, and by his receipt thereof, as shown in the attached waiver by the said Harold Louderback of personal service of summons, said waiver being made a part of this return.

CHESLEY W. JURNEY,
Sergeant at Arms, United States Senate.

IN THE SENATE OF THE UNITED STATES, SITTING AS A COURT OF IMPEACHMENT IN THE CASE OF HAROLD LOUDERBACK, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA

Waiver of personal service of Harold Louderback, United States district judge for the northern district of California.

I, Harold Louderback, United States district judge for the northern district of California, do hereby waive personal service of summons issued on the 13th day of March, 1933, by Hon. John N. Garner, Vice President and President of the Senate, which commands me to appear before the Senate of the United States on April 11, 1933, at 12:30 p. m., to answer specific articles of impeachment exhibited to the Senate by the House of Representatives, and agree to voluntarily appear in person before the Senate of the United States at the aforesaid time.

I acknowledge receipt of a true and attested copy of the writ of summons issued in this case, together with a like copy of the precept.

Witness my signature this 28th day of March, 1933, at the city of San Francisco, State of California.

HAROLD LOUDERBACK,
Respondent.

Signature of witness:
JAMES M. HANLEY.

The Vice President announced that in view of the waiver of summons by the respondent, the administration of the oath to the Sergeant at Arms would be dispensed with, and directed the Sergeant at Arms to make proclamation.

The Sergeant at Arms made proclamation:

Harold Louderback! Harold Louderback! Harold Louderback, United States district judge for the northern district of California: Appear and answer to the articles of impeachment exhibited by the House of Representatives against you.

The Vice President resumed:

The Chair advises the counsel for the respondent that the Senate is now sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon the articles of impeachment exhibited by the House of Representatives, and will hear his answer thereto.

Mr. Linforth, of counsel for the respondent, announced that the respondent appeared in person and by counsel, and submitted a written appearance which he asked to have filed and which was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, APPEARANCE OF RESPONDENT.

The respondent, Harold Louderback, having been served with a summons requiring him to appear before the Senate of the United States of America at their Chamber in the city of Washington, on the 11th day of April, 1933, at

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12:30 o'clock afternoon, to answer certain articles of impeachment presented against him by the House of Representatives of the United States, now appears in his proper person and also by his counsel, who are instructed by this respondent to inform the Senate that respondent is ready to file his answer to said articles of impeachment at this time.

Dated this 11th day of April, 1933.

HAROLD LOUDERBACK.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Respondent.

The Vice President directed that the appearance be placed on file, and said:

Counsel for the respondent may make a statement, or the respondent in person may do so.

Mr. Linforth then presented the answer of the respondent to the articles of impeachment which, by direction of the Vice President, was read by the Secretary as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK, UPON ARTICLES OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

Answer of respondent Harold Louderback to the articles of impeachment against him by the House of Representatives of the United States

ANSWER TO ARTICLE I

For answer to the first article the respondent says that this honorable court ought not to have or take further cognizance of the first of said articles of impeachment so exhibited and presented against him, because, he says, the facts set forth in said first article do not, if true, constitute an impeachable high crime and misdemeanor as defined in the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said first article.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said first article, said respondent saving to himself all advantages of exception to said first article, for answer thereto saith:

I

Admits that he is now and was at all times mentioned in said article a duly appointed, qualified, and acting judge of the United States District Court for the Northern District of California.

II

Further answering said article, the respondent admits, denies, and alleges as follows:

Admits that on the 11th day of March, 1930, by an order duly made and entered in that certain action then pending in the United States District Court for the Northern District of California, in which Gardner M. Olmstead was plaintiff and Russell Colvin Co. was defendant, he appointed one Addison G. Strong as equity receiver.

Admits that on the 13th day of March, 1930, by an order duly made and entered in said action he revoked and set aside the order appointing said Addison G. Strong as receiver in said action.

Alleges that the facts and circumstances surrounding and leading up to the making of the said order on the 13th day of March, 1930, setting aside the appointment of the Addison G. Strong were as follows, and not otherwise:

(The remainder of Article II and Articles III, IV, and V set forth in detail the respondent's answer to the specific charges in the articles of impeachment.)

Article V of the answer includes the following:

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I

That said Article V is so uncertain and indefinite as to time, place, and proceedings that respondent can not ascertain therefrom with reasonable, or any, certainty, in what proceeding or proceedings, or at what time or times, or at what place or places, his conduct was, as set forth in said Article V, and respondent can not safely proceed to trial as to said fifth article before this honorable Senate, sitting as a Court of Impeachment, at a distance of more than 3,000 miles from where respondent has presided as such judge, as aforesaid, without being apprised in advance in the particulars aforesaid, in order to procure the attendance of such witnesses as may be necessary to meet such charge or charges.

Wherefore respondent, upon the reading and filing of this answer will move the honorable Senate of the United States, sitting as a Court of Impeachment, to require the honorable House of Representatives of the United States, within a reasonable time, to be by it specified, to make said fifth article more definite and certain in the particulars aforesaid, and failing so to do, this honorable body dismiss said Article V.

And without waiving but expressly reserving his right to make said motion and to have the same passed upon by the honorable Senate of the United States, sitting as a Court of Impeachment, respondent, answering said Article V, admits and denies as follows, to wit:

The answer concluded:

V

Respondent further denies that he ever was or now is guilty of misbehavior as such judge and/or of a misdemeanor in office.

Except as hereinafter specifically admitted, respondent denies each and every allegation in said Article V contained.

And this respondent in submitting to this honorable court this his answer to the articles of impeachment exhibited against him, respectfully insists that he is not guilty of any of the charges contained in any of the said 5 articles of impeachment, and respectfully reserves leave to amend and add to this his said answer from time to time as may become necessary or proper and when said necessity and propriety shall appear.

Dated April 11, 1933.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Of Counsel for Respondent.

Mr. Linforth then submitted written notice of a motion to make the fifth article in the articles of impeachment more definite and certain. The notice was read by the Secretary, as follows:

IN THE SENATE OF THE UNITED STATES,
SITTING AS A COURT OF IMPEACHMENT.

THE UNITED STATES OF AMERICA *v.* HAROLD LOUDERBACK—MOTION TO MAKE ARTICLE V OF THE ARTICLES OF IMPEACHMENT MORE DEFINITE AND CERTAIN

The respondent, Harold Louderback, moves the honorable Senate sitting as a Court of Impeachment, for an order requiring the honorable House of Representatives of the United States, within a reasonable specified time, to make more definite and certain the charges contained in Article V of the articles of impeachment herein in the following particular or particulars, that is to say:

To specify the time and times, and the place or places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

Said motion is made for the reason and on the ground that it is impossible for respondent to be prepared to meet said charges and to summon witnesses in regard thereto without first being advised of the time and times, and the place and places, and the name or title of the proceeding or proceedings, and the circumstance or circumstances wherein in said fifth article it is claimed the said respondent was guilty of the conduct referred to and set forth therein.

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And, in the event of the failure of said House of Representatives within the time so fixed to amend said fifth article in the particulars aforesaid, that this honorable body dismiss the charges contained in said fifth article.

Dated April 11, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

In conformity with the notice, Mr. Linforth, on behalf of the respondent, moved to require the House to specify, in the particulars set forth, the fifth count of the articles of impeachment, and failing to do so within a reasonable time, that the article be dismissed.

Mr. Manager Sumners responded:

Mr. President, the managers on the part of the House, in order to comply with the suggestion of counsel for the respondent and to save the necessity of considering the motion, consent to attempt to make article 5 more specific and to procure the endorsement of the House of Representatives. It is understood that we can not of ourselves do these things. They have to be done through the House, but we will undertake to do the best we can.

Accordingly, on motion of Mr. Ashurst, it was—

Ordered, That the managers on the part of the House be allowed until the 15th day of May, 1933, at 1 o'clock in the afternoon, to present a replication or other pleading, of the House of Representatives to the answer of the respondent. That any subsequent pleadings, either on the part of the managers or of the respondent, shall be filed with the Secretary of the Senate, of which notice shall be given to the House of Representatives and the respondent, respectively, so that all pleadings shall be closed on or before the 15th day of May, 1933, and that the trial on Monday, the 15th day of May, 1933, at 1 o'clock p.m.

During the discussion occasioned by the proposed order, Mr. Long dissented and was proceeding in debate, when Mr. Sam G. Bratton, of New Mexico, made the point of order that under the rules governing impeachment trials Senators were not permitted to engage in colloquies.

The Vice President said:

The point of order is sustained.

An order having been made for printing the answers of the respondent for the use of the Senate, it was further:

Ordered, That lists of witnesses be furnished to the Sergeant at Arms by the managers and by the respondent, and said witnesses shall be subpoenaed to appear on Monday, the 15th day of May, 1933, at 1 o'clock p.m.

519. Certain rules adopted by the Senate for the trial of Judge Louderback.

Managers and counsel for respondent might submit applications orally to the Presiding Officer but if requested by any Senator should reduce them to writing.

Managers and counsel for respondent were required to address motions or objections directly to the Presiding Officer and not otherwise.

Senators might not engage in colloquies or address directly the managers, the counsel, or each other.

Stipulations in writing by parties were received by the Senate as though the facts therein agreed upon had been established by evidence.

Decisions of the Presiding Officer on questions raised by parties in the course of the trial stood as the judgment of the Senate unless a Senator made formal request for a vote thereon.

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Mr. Bratton, from the Senate Committee on the Judiciary, offered the following:

***Ordered*, That in addition to the rules of procedure and practice in the Senate when sitting on impeachment trials, heretofore adopted, and supplementary to such rules, the following rules shall be applicable in the trial of the impeachment of Harold Louderback, United States judge for the northern district of California:**

1. In all matters relating to the procedures of the Senate, whether as to form or otherwise, the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

2. In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers on the part of the House or counsel representing the respondent desire to make any application, request, or objection, the same shall be addressed directly to the Presiding Officer and not otherwise.

3. It shall not be in order for any Senator, except as provided in the rules of procedure and practice in the Senate when sitting on impeachment trials, to engage in colloquy or to address questions either to the managers on the part of the House or to counsel for the respondent, nor shall it be in order for Senators to address each other; but they shall address their remarks directly to the Presiding Officer and not otherwise.

4. The parties may, by stipulation in writing filed with the Secretary of the Senate and by him laid before the Senate or presented at the trial, agree upon any facts involved in the trial; and such stipulation shall be received by the Senate for all intents and purposes as though the facts therein agreed upon had been established by legal evidence adduced at the trial.

5. The parties or their counsel may interpose objection to witnesses answering questions propounded at the request of any Senator, and the merits of any such objection may be argued by the parties or their counsel; and the Presiding Officer may rule on any such objection, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be without debate and without a division, unless the ayes and nays be demanded by one fifth of the Members present, when the same shall be taken.

The order was agreed to, and the Senate sitting as a court of impeachment stood in recess.

520. In response to respondent's motion to make more certain, the House revised an article of the articles of impeachment and transmitted it to the Senate as amended—On April 17 [25] the Speaker laid before the House the following communication from the Senate:

I, Edwin A. Halsey, Secretary of the Senate of the United States of America, certify that the Senate, sitting for the trial of Harold Louderback, United States district judge for the northern district of California, upon articles of impeachment exhibited against him by the House of Representatives of the United States of America, did on April 11, 1933, adopt an order, of which the following is a full, true, correct, and compared copy:

"*Ordered*, That the Secretary of the Senate communicate to the House of Representatives an attested copy of the answer of Harold Louderback, judge of the United States district court in and for the northern district of California, to the articles of impeachment, and also a copy of the foregoing order."

I do hereby further certify that the document hereto attached, consisting of 38 sheets, is a photostatic copy of the answer of said Harold Louderback to the articles of impeachment exhibited against him by the House of Representatives, presented by said Harold Louderback to the Senate, sitting as Court of Impeachment, on April 11, 1933.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America this 12th day of April, A. D. 1933.

[SEAL.] EDWIN A. HALSEY,
Secretary of the Senate of the United States.

[25] Record, p. 1846.

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Mr. Sumners called up as privileged a proposed amendment to article 5 of the articles of impeachment as follows:

AMENDMENT TO ARTICLE 5 OF THE ARTICLE OF IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES AGAINST HAROLD LOUDERBACK, JUDGE OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Article 5 is amended to read as follows:

"ARTICLE 5.

"It is intended by article 5 to charge, and it is charged, that the reasonable and probable result of Harold Louderback's action in his capacity as judge in making decisions and orders in actions pending in his court and before him as said judge and by the method of appointing receivers and attorneys for receivers, by appointing incompetent receivers and attorneys, by his relationship and transactions with one Sam Leake, and by the relationship and transactions of the said Sam Leake with such appointees of the said respondent made possible and probable by the action and attitude of the said Harold Louderback, and by displaying a high degree of indifference to the interest of estates and parties in interest in receivership before him and his court, and by displaying a high degree of interest in making it possible for certain individuals and firms to derive large fees from the funds of such estates, has been to create a general condition of wide-spread fear and distrust and disbelief in the fairness and disinterestedness of the official actions of the said Harold Louderback, and to create by his said acts, deeds, and relationships, contrary to his individual and official duty, a favorable condition and a cause for the development naturally and inevitably of rumors and suspicions destructive of public confidence in and respect for the said Harold Louderback as an individual and a judge to the scandal and disrepute of his said court and the administration of justice therein and prejudicial generally to the public respect for and public confidence in the Federal judiciary. Wherefore the said Harold Louderback was and is guilty of misbehavior as such judge and of misdemeanors in office.

"It is hereby alleged and charged that the conduct of said Harold Louderback as alleged in articles 1, 2, 3, and 4, and as hereinafter alleged, in its general and aggregate result has been such as reasonably and probably calculated to destroy public confidence in so far as he and his court are concerned in that degree of disinterestedness and fidelity to judicial duty and responsibility which the public interest requires shall be held by the people in the Federal courts and in those who administer them, and which for a Federal judge to hurt or destroy is a crime and misdemeanor of the highest order;

"First, specifying as indicative of and disclosing the character and judicial attitude of said Harold Louderback revealed by his acts and official conduct to the people among whom he has jurisdiction, and the cause of the loss of public confidence of the bar and people of the northern district of California and particularly of the city of San Francisco, where the principal business of such court is transacted, on or about December 19, 1929, the said Harold Louderback appointed one Guy H. Gilbert receiver of the Sonora Phonograph Co., a going concern extensively engaged in the business of receiving and distributing radios and phonographs, the said Guy H. Gilbert being a personal and political friend of the said Harold Louderback, and an intimate friend and financial contributor to one Sam Leake, hereinafter referred to, the said Harold Louderback knowing at the time of such appointment that the whole training and experience of the said Guy H. Gilbert had been as operator and employee of a telegraph company, and the said Harold Louderback at the time of such appointment knowing with certainty that the said Guy H. Gilbert was without qualification to discharge the duties of receivership, that the said Guy H. Gilbert was appointed such receiver by the said Harold Louderback without regard to the interest of such estate in receivership and in disregard thereof and of the interest of creditors and parties in interest and in violation of the official duty of the said Harold Louderback. That the said Gilbert after said appointment continued in his regular and usual duties and employment as employee of said telegraph company, drawing his accustomed salary during his employment of approximately 6 months as such receiver and received for such services from the funds of the estate of said Sonora Phonograph Co. the sum of $6,800, all of which facts became the subject of newspaper comments and matters of common knowledge

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throughout and beyond the northern judicial district of California, to the hurt of public confidence in the said Harold Louderback, judge of said court, and to the hurt and standing of the Federal judiciary.

The proposed amendment then recounted the appointment of Guy H. Gilbert as receiver in various other cases and charged that he was incompetent and had not in fact discharged the duties of receiver but had merely signed the papers in such cases and accepted sums which were a small part of the compensation allowed by the respondent in his capacity as judge. The amendment concluded:

All of which facts and circumstances became published and known in said northern district of California. By such acts the said Harold Louderback exhibited himself to the public as being willing to obstruct the officials of the State of California in their effort to conserve for citizens of California the assets of said insurance company which they had impounded, willing to assert a jurisdiction which he did not possess, willing to defy a mandate of the circuit court of appeals and attach an illegal and unconscionable condition to said mandate in order to penalize and discourage the exercise of a constitutional right of appeal for the definite and obvious purpose of making sure, so far as possible by such illegal action and coercion, that the said Shortridge and his attorney would be paid from the assets of said insurance company so impounded the fees which he, the said Harold Louderback, had allowed, all to the scandal and discredit of the said Harold Louderback and his court and prejudicial to the dignity of the judiciary.

"Wherefore the said Harold Louderback has been and is guilty of high crimes and misdemeanors in office and has not conducted himself with good behavior."

After brief debate, the amendment was agreed to and on motion of Mr. Sumners it was—

Resolved, That a message be sent to the Senate by the Clerk of the House informing the Senate that the House of Representatives has adopted an amendment to article 5 of the articles of impeachment heretofore exhibited against Harold Louderback, United States district judge for the northern district of California, and that the same will be presented to the Senate by the managers on the part of the House.

And also that the managers have authority to file with the Secretary of the Senate, on the part of the House, any subsequent pleadings they shall deem necessary.

521. The amended article of impeachment when received in the Senate was filed without being read, it having previously appeared in full in the Record.

The answer of the respondent to the amended article of impeachment.

The managers were excused from attendance on the sessions of the House during the course of the trial in the Senate.

On April 18,[26] in the Senate sitting as a Court of Impeachment, on motion of Mr. Ashurst, by unanimous consent, the reading of the amendment adopted by the House to Article 5 of the articles of impeachment was dispensed with, it having appeared in full in the Record of the previous day.

The respondent, by counsel, tendered his answer to Article 5 as amended by the House and proposed to enter a motion to strike out certain portions of the amended article and asked to be heard on the motion.

The answer was received and filed without reading as follows:

ANSWER TO ARTICLE 5, AS AMENDED

For answer to Article 5, as amended, the respondent says that this honorable court ought not to have or take further cognizance of said fifth article of impeach-

[26] Record, p. 1877.

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ment so exhibited and presented against him, because, he says, the facts set forth in said fifth article, as amended, do not, if true, constitute an impeachable high crime and misdemeanor as defined by the Constitution of the United States, and that therefore the Senate, sitting as a Court of Impeachment, should not further entertain the charge contained in said fifth article as so amended.

And now, not waiving the foregoing plea to the jurisdiction of the honorable Senate of the United States, sitting as a Court of Impeachment, as to said fifth article, as amended, said respondent saving to himself all advantages of exception to said fifth article, as amended, for answer thereto saith:

Further answering said Article 5 as so amended, the respondent admits, denies, and alleges as follows:

Then follow specific admissions, denials, and allegations.

The answer concluded:

And, except as hereinbefore specifically admitted herein, respondent denies each and every allegation contained in said article 5, as so amended, relating or referring to the said *Golden State Asparagus Co. case*, so called.

Wherefore respondent having fully answered said article 5, as amended, declares that he is not guilty of any of the charges therein contained and denies that he has been or that he is guilty of high crimes and misdemeanors in office, or has been guilty of any high crime or any misdemeanor in office, and likewise denies that he has not conducted himself with good behavior.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

APRIL 18, 1933.

The following motion was filed on behalf of the respondent:

MOTION TO STRIKE OUT OR MAKE MORE CERTAIN PORTIONS OF ARTICLE 5, AS AMENDED

The respondent, Harold Louderback, moves the Honorable Senate, sitting as a Court of Impeachment, for an order as follows:

1. Striking from article 5, as amended, the first paragraph thereof, constituting the entire first page; and

2. Striking therefrom the following part and portion thereof contained in pages 3 and 4 and reading as follows:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback well knowing at the time of such appointments that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

The first part of said motion is based upon the ground and for the reason that it is impossible for respondent to be prepared to meet the said charge therein contained or to summon witnesses in respect thereto without being advised, first, the nature of the act or acts there attempted to be complained of; second, the time or times of said act or acts were committed by respondent; third, in what action or actions, proceeding or proceedings, such alleged acts occurred; fourth, the nature of the relationship and transactions of said Leake there attempted to be referred to and, fifth, with what appointee or appointees of respondent said "relationship and transactions" with the said Leake occurred.

And the second part of said motion is based upon the grounds that the alleged offense there referred to was not committed in the office now occupied by respondent and that this honorable Senate, sitting as a Court of Impeachment, has not jurisdiction to inquire into the transaction attempted to be complained of in said article 5, as amended, in that the act there attempted to be complained of is not and can not be the subject of this article of impeachment, and is not and can not be a high crime or misdemeanor as defined by the Constitution of the United States, but if true is an act committed by respondent while an officer of a State and not a Federal court.

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And, in the event of the denial of said motion, or either part thereof, then and in such event, respondents moves this honorable Senate, sitting as a Court of Impeachment, to require the House of Representatives of the United States within a time so to be fixed, to further amend said article 5 in the particulars and each thereof specified herein as the reason and grounds for the making of said motion to strike therefrom the portions of said article 5, as amended, above specified.

Dated: April 18, 1933.

WALTER H. LINFORTH,
JAMES M. HANLEY,
Counsel for Said Respondent.

Mr. Hanley, of counsel for the respondent, being recognized, said that an agreement had been reached with the managers on the part of the House under which the reference in paragraph 1 of the amended article 5 should refer only to matters set out in articles 1, 2, 3, and 4 and the rest of the amended article 5, and that no testimony relating to other matters would be offered.

Mr. Hanley cited a reference in paragraph 1 of the articles of impeachment referring to the conduct of the respondent while he was serving as a State judge and submitted that the conduct of the respondent as State judge was not within the jurisdiction of the Senate.

Mr. Manager Sumners, in reply, corroborated the statement of respondent's counsel with reference to the terms of the agreement between counsel for respondent and the managers on the part of the House; disclaimed any intention on the part of the managers to impeach the respondent on the strength of his conduct as a member of the State judiciary; and justified the inclusion of the matter referred to as admissible under "at least two well-recognized rules" governing the admissibility of evidence.

In the House on May 9,[27] on motion of Mr. Sumners, by unanimous consent, the managers on the part of the House in the impeachment proceedings before the Senate were excused from attendance upon the sessions of the House until the conclusion of the trial.

522. The replication of the House to the answer of the respondent in the Louderback trial.

On motion of the managers, a clerk and additional counsel were authorized to sit with them in the conduct of the trial.

The managers announced that they had omitted the presentation of certain formal evidence, customary to impeachment proceedings, as relating to facts too obvious to require proof.

The Senate, by resolution, limited the opening statements to one person on each side.

The Vice President was authorized to name a Senator to preside in the absence of the President pro tempore.

Questions of order raised in the course of an impeachment trial are decided without debate.

A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

On May 15,[28] in the Senate, sitting for the trial, Mr. Manager Sumners submitted the replication of the House of Representatives to the answer of the respondent as follows:

[27] Record, p. 3084.
[28] Record, p. 3394.

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REPLICATION OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA TO THE ANSWER OF HAROLD LOUDERBACK, DISTRICT JUDGE OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, TO THE ARTICLES OF IMPEACHMENT, AS AMENDED, EXHIBITED AGAINST HIM BY THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA

The House of Representatives of the United States of America, having considered the several answers of Harold Louderback, district judge of the United States for the northern district of California, to the several articles of impeachment, as amended, against him by them exhibited in the name of themselves and of all the people of the United States, and reserving to themselves all advantages of exception to the insufficiency, irrelevancy, and impertinency of his answer to each and all of the several articles of impeachment, as amended, so exhibited against the said Harold Louderback, judge as aforesaid, do say:

(1) That the said articles, as amended, do severally set forth impeachable offenses, misbehaviors, and misdemeanors as defined in the Constitution of the United States, and that the same are proper to be answered unto by the said Harold Louderback, judge as aforesaid, and sufficient to be entertained and adjudicated by the Senate sitting as a Court of Impeachment.

(2) That the said House of Representatives of the United States of America do deny each and every averment in said several answers, or either of them, which denies or traverses the acts, intents, misbehaviors, or misdemeanors charged against the said Harold Louderback in said articles of impeachment, as amended, or either of them, and for replication to said answers do say that Harold Louderback, district judge of the United States for the northern district of California, is guilty of the impeachable offenses, misbehaviors, and misdemeanors charged in said articles, as amended, and that the House of Representatives are ready to prove the same.

HATTON W. SUMNERS,
On Behalf of the Managers.

In response to the motion of the respondent that certain allegations in article 5 of the articles of impeachment be made more certain, Mr. Sumners presented the following:

MAKING MORE SPECIFIC AN ALLEGATION CONTAINED IN ARTICLE 5, ARTICLES OF IMPEACHMENT, AS AMENDED

Whereas on April 17, 1933, the managers on the part of the House of Representatives, in the impeachment against Harold Louderback, filed an amendment to article 5 of the Articles of Impeachment, which contains the following language:

"It also became a matter of newspaper comment in connection with that receivership matter and others that theretofore, about 1925 or 1926, the said Gilbert had been appointed by the said Harold Louderback when the said Harold Louderback was a judge of the Superior Court of California, an appraiser of certain real estate, the said Harold Louderback well knowing at the time of such appointment that the said Gilbert was without any qualification to appraise the value of such real estate, and in truth the said Gilbert never saw said real estate, and that the said Gilbert did not undertake to assist in the appraisal of said real estate, only signing the report which was presented to him, for which services he was allowed the sum of $500."

And whereas said language and allegation was objected to by counsel for Harold Louderback by a motion to strike out said language on the ground that the said Harold Louderback was not advised of "the time or times (of) said acts were committed by respondent," or "in what action or actions, proceeding or proceedings such alleged acts occurred;" whereupon the managers agreed with counsel for the said Harold Louderback that they would endeavor to give to said counsel more exact information with regard to said transaction, and failing to do so by the 5th of May the said allegations would be withdrawn and no evidence offered in their support, counsel for the said Harold Louderback agreeing that they would exert themselves to try to ascertain the facts with regard to the transaction referred to and advise the managers.

Since such agreement and understanding, the managers have ascertained more definite information with reference to this transaction, and now allege the facts to be that on or about April 5, 1927, in the matter of the estate of Howard Brickell, No. 46618, pending in probate that said Harold Louderback appointed

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the said Guy H. Gilbert an appraiser of property of said estate and also appointed with him as appraiser of said property Sam Leake, referred to in said article 5 of the Articles of Impeachment as amended; that on or about December 21, 1927, the said Harold Louderback made an order awarding to the said Guy H. Gilbert and to the said Sam Leake the sum of $500 each for their services; which information has been furnished to the said counsel for Harold Louderback.

HATTON W. SUMNERS, *Chairman,*
On Behalf of the Managers.

Mr. William H. King, of Utah, offered a resolution which was agreed to as follows:

Ordered, That the opening statement on behalf of the managers shall be made by one person, to be immediately followed by one person who shall make the opening statement on behalf of the respondent.

The managers on the part of the House requested the privilege of having with them in the trial the clerk of the House Committee on the Judiciary to assist them in handling the documents in the case; and that Mr. Bianchi, a member of the bar of San Francisco, also be permitted to sit with them.

Mr. Hanley inquired whether Mr. Bianchi was to be called as a witness, and Mr. Manager Sumners, in reply, proposed to discuss the question, when Mr. Bratton raised the question of order that under the rules of the Senate the point should be decided by the Chair without comment or debate from the floor.

The Vice President sustained the point of order.

The Vice President, having entertained the request of the managers that the clerk of the House Judiciary Committee and Mr. Bianchi be permitted to sit with them, preferred to submit it to the Senate; and the question being put, it was decided in the affirmative, and the permission was granted, as requested.

By direction of the Vice President, on request of counsel for the respondent, the Secretary of the Senate read the answer of the respondent to article 5 as last amended, as follows:

Answer of respondent to Article V as last amended

Respondent admits that on or about the 5th day of April, 1927, while acting as judge of the Superior Court of the State of California in and for the city and county of San Francisco, in the matter of the estate of Howard Brickell, deceased, he made an order appointing Guy H. Gilbert, W. S. Leake, and R. F. Morgan appraisers; that in said matter Crocker First Federal Trust Co., of San Francisco, was special administrator of said estate; that in the first and final account of said trust company was included the sum of $500 each paid to said Gilbert and said Leake as appraisers' fees therein; that upon the hearing of the settlement of said account, an officer of said trust company testified that said account was in all respects true and correct; that the inventory on file in said estate showed its appraised value to be $1,020,804.38; that thereupon respondent, as judge of said superior court, made an order settling and allowing said account. Other than as hereinabove specifically set forth, respondent denies that he made any order awarding said Gilbert and said Leake, or either of them, $500 for their said services as such appraiser.

HAROLD LOUDERBACK,
Respondent.
WALTER H. LINFORTH,
JAMES M. HANLEY,
Attorneys for Respondent.

In his opening statement, Mr. Manager Sumners informed the Court that he would deviate from the practice usually observed in such proceedings and would not introduce the commission of the

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respondent or make specific reference to the preliminary action on the part of the House of Representatives, taking it for granted that the respondent was known to be a Federal judge for the northern district of California, and that it was understood that the ordinary routine has been followed in the House leading up to the proceedings in the court of impeachment.

In the course of the opening statement in behalf of the respondent, Mr. Ashurst addressed the Chair and asked recognition to offer a resolution.

The Vice President inquired:

Will counsel suspend for that purpose?

The counsel for the respondent having answered in the affirmative, the resolution was offered by Mr. Ashurst and agreed to as follows:

Ordered, That during the trial of the impeachment of Harold Louderback, United States district judge for the Northern District of California, the Vice President, in the absence of the President pro tempore, shall have the right to name in open Senate, sitting for said trial, a Senator to perform the duties of the Chair.

The President pro tempore shall likewise have the right to name in open Senate, sitting for said trial, or, if absent, in writing, a Senator to perform the duties of the Chair; but such substitution in the case of either the Vice President or the President pro tempore shall not extend beyond an adjournment or recess, except by unanimous consent.

Under the provisions of the resolution, the Vice President called Mr. Bratton to the Chair, and the counsel for the respondent resumed his statement.

During the further course of the statement Mr. Long addressed the Chair and desired to submit a question to be answered by the counsel for the respondent.

Mr. Ashurst interposed the point of order that all questions propounded by Senators should be in writing.

The Presiding Officer sustained the point of order.

523. Witnesses in an impeachment trial were required to give their testimony standing, but this requirement was held not to apply to counsel.

In the Louderback impeachment trial witnesses were sworn as called and not en banc.

In the Louderback impeachment the Senate ordered process to compel the attendance of a witness who declined to appear in response to subpoena.

Evidence relating to events occurring prior to Judge Louderback's appointment to the Federal bench were admitted to establish matters pertinent to the impeachment proceedings.

Exhibits relating to the case at bar but also embodying extraneous and irrelevant material were admitted in full over the objection that only the pertinent matters should be read into the record.

The issuance of process for the attachment of a witness was held not to bar the admission of depositions by such witness pending his arrival.

The opening statements having been concluded, on the proposal of Mr. Ashurst it was—

Ordered, That the witnesses shall stand while giving their testimony.

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In response to an inquiry by Mr. Manager Sumners, as to whether counsel should also stand while examining the witness, the Presiding Officer [29] held—

It is the judgment of the present occupant of the chair that counsel may sit or stand, according to their convenience.

Mr. Manager Sumners further inquired if each witness should be sworn as examined or if all witnesses should be called and sworn at once.

The Presiding Officer said:

The Chair thinks that the business of the court would be expedited by swearing each witness as he enters the Chamber. The oath can be administered quickly.

The introduction of testimony on behalf of the managers then began and continued through May 15, 16, 17, and 18. On May 18 [30] Mr. Manager Sumners announced that the managers had no further evidence to offer at that time, and the introduction of testimony on behalf of the respondent began and continued until May 23, when both parties rested.

On May 16 [31] the Vice President laid before the Senate the return of the Sergeant at Arms which was printed and noted in the Journal as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 15, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate,
Washington, D.C.

MY DEAR MR. VICE PRESIDENT: There are attached hereto a list of witnesses for the Government submitted to me by the managers on the part of the House of Representatives, and a list of witnesses for the respondent submitted to me by his counsel, all of said witnesses to be subpoenaed for the trial of Harold Louderback, United States district judge for the northern district of California

There are also attached hereto original subpoenas personally served by me on the witnesses desired by both parties, said subpoenas being duly served and return made according to law.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

(Then followed the list of witnesses for the Government and the list of witnesses for the respondent.)

On motion of Mr. Ashurst it was—

Ordered, That the daily sessions of the Senate sitting for the trial of the impeachment of Harold Louderback, United States district judge for the northern district of California, shall, unless otherwise ordered, commence at 10 o'clock in the forenoon.

Mr. Hanley, of counsel for the respondent, moved that commission issue for taking the deposition of one W. S. Leake in San Francisco, and in support of his motion read this telegram:

Hon. JOHN N. GARNER,
Vice President of the United States and President of Senate,
Washington, D.C.

Mr. Leake, under subpoena Louderback trial, quite weak physically, due age and cerebral arteriosclerosis. Been his family doctor many years. Travel to Wash-

[29] Sam G. Bratton, of New Mexico, Presiding Officer.
[30] Record, p. 3633.
[31] Record, p. 3444.

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ington impractical, but if imperative should be accompanied by a nurse. Please instruct.

RUSSEL C. RYAN, M.D.,
Fairmont Hotel.

Mr. Manager Perkins resisted the motion and submitted the following excerpt from stipulations, previously entered into by counsel for the respondent and the managers on the part of the House, relative to certain testimony elicited before the special committee of the House of Representatives in San Francisco, in September, 1932.

It is further stipulated that the testimony of W. S. Leake and Miriam McKenzie, hotel maid, taken at the hearing above referred to, may be read upon said trial by either party hereto with the same force and effect as if said witness were present and testified in person. This stipulation, however, in so far as the said W. S. Leake is concerned without waiver by either party hereto to insist upon the attendance of said Leake before the court above referred to, and shall become operative only in the event of the nonappearance of the said Leake at Washington before the said Court of Impeachment.

Dated May 3, 1933.

GORDON BROWNING,
RANDOLPH PERKINS,
For the House Managers.
JAMES M. HANLEY,
WALTER H. LINFORTH,
Attorneys for Respondent.

The question being submitted to the court by the Vice President it was ordered, on motion of Mr. Bratton, that the Vice President be authorized to arrange for the attendance of the witness, to be accompanied by a nurse if that was deemed necessary.

Subsequently,[32] Mr. Manager Browning proposed to offer the testimony referred to in the stipulation before the arrival of the witness.

Mr. Hanley, of counsel for the respondent, objected on the ground that the witness would shortly arrive for examination in person.

The Vice President ruled:

The Chair overrules the objection. It seems to the Chair that reading the testimony, in view of the fact that Mr. Leake may be present in the Chamber, will not injure the cause of the respondent in any way.

In the course of the proceedings Mr. Manager Perkins proposed to offer in evidence certified copies of orders made by Judge Louderback appointing W. S. Leake and G. H. Gilbert appraisers in cases which had come before him in 1927 while on the State bench and prior to his appointment and confirmation by the Senate as a Federal judge.

Counsel for the respondent objected to the admission of the evidence on the ground that it related to matters occurring prior to the respondent's appointment as Federal judge and which for that reason were without the jurisdiction of the Court of Impeachment.

Mr. Manager Perkins rejoined that the orders were offered for the purpose of showing the long and intimate relation existing between Judge Louderback and W. S. Leake and G. H. Gilbert with whose appointment by respondent the case in trial was largely concerned.

The Presiding Officer[33] ruled:

The present occupant of the chair is very clear that it is admissible for whatever it may be worth for the purpose stated by the manager on the part of the House.

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[32] Record, p. 3503.
[33] Daniel O. Hastings, of Delaware, Presiding Officer.

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The orders being produced, respondent's counsel objected to their being admitted in full and contended that the announced purpose for which they were offered was fully served by the reading into the Record of the material parts germane to the case and that to admit them in full would admit many irrelevant matters not pertinent to the issues of the case at bar.

The Presiding Officer submitted the question of admissibility to the Court and in stating the question said:

The managers on the part of the House offered these papers for the record. Objection was made, and, after argument, the Chair held that these records were pertinent for one purpose, namely, to show the connection between the persons named in the papers and the respondent. The Chair sought to have the counsel on both sides agree that the material parts should be read into the record; but that was not satisfactory to the managers on the part of the House, who insisted that the whole records should be admitted. Counsel for the respondent objects to that because there are many things in the records themselves that are not in any sense material; and the question is whether or not the papers offered for the record shall be admitted.

The question having been taken, the Presiding Officer announced:

On this vote the yeas are 67 and the nays are 4, so the papers are admitted.

The Vice President laid before the Senate the following communication:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 17, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: I was commanded to serve and return a subpoena issued in the impeachment trial of Harold Louderback on one W. S. Leake, of San Francisco, Calif. Said subpoena was personally served by me on the said W. S. Leake on May 2, 1933, at San Francisco, and a return was duly made by me.

W. S. Leake was commanded to appear and testify on the 15th day of May, 1933, at 1 p.m., at the Senate Chamber in the city of Washington, and he has not appeared and refuses to appear and testify for the reason as stated by him to me personally on this day, that he is physically unable to do so.

This information is given to you so that the Senate of the United States may be officially informed in the matter.

Respectfully,

CHESLEY W. JURNEY,
Sergeant at Arms.

Thereupon, a resolution presented by Mr. Ashurst was agreed to, as follows:

Whereas the Senate of the United States pursuant to House Resolution 403, Seventy-second Congress, second session, and orders of the Senate of the United States adopted in relation thereto, has authorized that witnesses be summoned as required by the rules of procedure and practice of the Senate; and

Whereas it appears from the letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate, to Hon. John N. Garner, Vice President and President of the Senate, dated May 15, 1933, that one W. S. Leake, of San Francisco, Calif., was duly served with a subpoena on May 2, 1933, to appear on Monday, May 15, 1933, at 1 p.m., before the Senate of the United States at Washington, D.C., and then and there to testify his knowledge in the cause which is before the Senate in which the House of Representatives have impeached Harold Louderback, district judge of the United States for the Northern District of California; and

Whereas it appears from a letter of Chesley W. Jurney, Sergeant at Arms of the United States Senate to Hon. John N. Garner, Vice President and President of the Senate, dated May 16, 1933, that said W. S. Leake has not appeared in

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response to said subpoena duly issued and served, and the said W. S. Leake has failed, in disobedience of such subpoena, so to appear and answer; and

Whereas the appearance and testimony of said W. S. Leake is material and necessary in order that the Senate of the United States may properly execute the functions imposed upon it by the Constitution of the United States, and other action as the Senate may deem necessary and proper: Therefore be it

Ordered, That the Vice President and President of the Senate issue his warrant commanding the Sergeant at Arms or his deputy, to take into custody the body of the said W. S. Leake, whereever found, to bring the said W. S. Leake before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry; and to keep the said W. S. Leake to await the further order of the Senate.

On May 22, the Vice President laid before the Senate a further communication as follows:

SENATE OF THE UNITED STATES,
OFFICE OF THE SERGEANT AT ARMS,
Washington, D.C., May 20, 1933.

Hon. JOHN N. GARNER,
Vice President and President of the Senate, Washington, D.C.

MY DEAR MR. VICE PRESIDENT: In pursuance of the order of the Senate dated May 17, 1933, commanding me to forthwith arrest and take into custody and bring to the bar of the Senate W. S. Leake, of San Francisco, Calif., I did, acting through my deputy, W. A. Rorer, on May 17, 1933, arrest and take Mr. Leake into custody.

The said W. S. Leake is now in my custody, and I await the further order of the Senate.

The original warrant issued in the case is attached hereto.

Respectfully yours,

CHESLEY W. JURNEY,
Sergeant at Arms.

Whereupon counsel for respondent called the witness W. S. Leake who appeared and testified.

524. The respondent in impeachment proceedings attended throughout the trial and was present when the articles were voted on and judgment rendered.

In the Louderback impeachment trial the respondent appeared and testified at length in his own behalf.

After testimony had been closed and the opening argument concluded in the Louderback trial, further questions were propounded in writing and were answered by the respondent.

The Senate limited the time but did not restrict the number participating in the final arguments in the Louderback impeachment.

The counsel for the respondent having touched on extraneous matters in his final argument in the Louderback trial, was admonished by the presiding officer to confine himself to the record.

In the Louderback trial the Senate deliberated behind closed doors before voting on the articles of impeachment.

Form of question prescribed for ascertaining the judgment of the court in the Louderback trial.

It was announced that pairs would not be arranged or recognized in the final vote on the articles of impeachment in the Louderback trial.

Senators were permitted to excuse themselves from voting on articles of impeachment as they were reached without having given notice of such intention prior to the vote on Article 1.

Two-thirds not having voted guilty on any article, the presiding officer declared Judge Louderback acquitted.

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On May 23,[34] the respondent, Harold Louderback, was called and testified in his own behalf on direct examination by his counsel and on cross-examination by the managers. At the conclusion of his testimony, Mr. Linforth announced that the respondent rested. After brief testimony in rebuttal introduced by the managers, Mr. Manager Sumners on conference with Mr. Linforth, informed the court that all testimony had been concluded.

Whereupon, on motion of Mr. Ashurst, an order was entered finally excusing all witnesses from further attendance, and it was further—

Ordered, That the time for final argument of the case of Harold Louderback shall be limited to 4 hours, which said time shall be divided equally between the managers on the part of the House of Representatives and the counsel for the respondent, and the time thus assigned to each side shall be divided as each side for itself may determine.

On May 24,[35] Mr. Manager Browning opened the argument on behalf of the House of Representatives. At the conclusion of his remarks, Mr. Tom Conally, of Texas, addressed the Chair and asked, as a parliamentary inquiry, if it would be in order to propound further questions in writing to the respondent.

The Vice President replied:

The Chair does not think so. The case has been closed, as the Chair understands it, unless the Senate orders otherwise. If there is no objection on the part of the respondent, the Chair will admit the question.

There was no objection and Mr. Connally submitted certain questions in writing which were answered by the respondent.

Mr. Linforth then argued in behalf of the respondent. In the course of Mr. Linforth's argument, Mr. Manager Sumners interposed and said:

Mr. President, I do not desire to interrupt counsel, but I give notice that if this is going to be the line of argument we shall endeavor to some degree to avail ourselves of it. We say that counsel is testifying at this time. I do not desire to object. I merely desire to serve notice now that we are going to avail ourselves of that line of argument.

The Presiding Officer admonished:

Counsel will confine themselves to the record.

Mr. Manager Sumners concluded the argument on behalf of the managers.

Thereupon, a motion presented by Mr. Ashurst that the doors of the Senate be closed for deliberation was agreed to; the managers on the part of the House and the respondent with his counsel withdrew from the Chamber; the galleries were cleared; and at 3 o'clock and 5 minutes p.m. the Senate proceeded to deliberate with closed doors.

At 4 o'clock and 45 minutes p.m. the doors were reopened, and the managers on the part of the House and respondent with his counsel appeared in the seats provided for them.

Mr. Joseph T. Robinson, of Arkansas, announced:

I have been requested to state that on these votes pairs will not be arranged or recognized.

The following order submitted by Mr. Ashurst was agreed to:

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, the Secretary shall read the articles of impeachment separately and successively, and when the reading of each article shall have been concluded the Presiding Officer shall state the question thereon as follows:

[34] Record, p. 3971.
[35] Record, p. 4064.

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"Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article?"

Thereupon the roll of the Senate shall be called, and each Senator, as his name is called, unless excused, shall arise in his place and answer "Guilty" or "Not guilty."

In response to a parliamentary inquiry from Mr. Alben W. Barkley, of Kentucky, as to whether a Senator could be excused from voting on any article as it was reached in its order or whether notice should be given in advance of the reading of the first article, the Vice President, held:

The Chair is of opinion that a Senator can ask to be excused from voting on any article at any time.

On motion of Mr. Ashurst, it was further—

Ordered, That upon the final vote in the pending impeachment of Harold Louderback, each Senator may, within 2 days after the final vote, file his opinion in writing to be published in the printed proceedings in the case.

The Vice President directed the Secretary to read the first article of the articles of impeachment, and following the reading, put the question:

Senators, how say you? Is the respondent, Harold Louderback, guilty or not guilty as charged in this article? The secretary will proceed to call the roll, and as the name of each Senator is called, he will rise in his place and deliver his vote.

The roll having been called, the Vice President announced:

On the first article of impeachment 34 Senators have voted "guilty" and 42 Senators have voted "not guilty." Less than two-thirds having voted in favor of his guilt, the Senate adjudges that the respondent, Harold Louderback, is not guilty as charged in the article.

The clerk will read the next article.

In like manner the vote was taken and announced on each of the remaining articles, with the following results:

	Guilty	Not guilty
Article I	34	42
Article II	23	47
Article III	11	63
Article IV	30	47
Article V (as amended)	45	34

The Vice President summarized:

That completes the articles of impeachment, and, with the permission of the Senate sitting as a court, the Chair will enter in the record the following judgment, which the clerk will read.

The legislative clerk read:

JUDGMENT

The Senate having tried Harold Louderback, judge of the District Court of the United States for the Northern District of California, upon five several articles of impeachment exhibited against him by the House of Representatives, and two-thirds of the Senators present not having found him guilty of the charges contained therein: It is therefore

Ordered and adjudged, That the said Harold Louderback be, and he is, acquitted of all the charges in said articles made and set forth.

And then,

On motion of Mr. Ashurst, at 6 o'clock and 5 minutes p.m. the Senate sitting as a court of impeachment in the case of Harold Louderback adjourned sine die.

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Impeachment Proceedings Not Resulting in Trial*

1. **Inquiries into the conduct of judges:**
   - **Lebbeus R. Wilfley in 1908. Section 525.**
   - **Cornelius H. Hanford in 1912. Section 526.**
   - **Emory Speer in 1913. Section 527.**
   - **Daniel Thew Wright in 1914. Section 528.**
   - **Alston G. Dayton in 1914. Section 529.**
   - **Kenesaw Mountain Landis in 1921. Section 535.**
   - **William E. Baker in 1925. Section 543.**
   - **George W. English in 1925. Sections 544–547.**
   - **Frank Cooper in 1927. Section 549.**
   - **Francis A. Winslow in 1929. Section 550.**
   - **Harry B. Anderson in 1930. Section 551.**
   - **Grover M. Moscowitz in 1930. Section 552.**
   - **Harry B. Anderson in 1931. Section 542.**
2. **Investigation of the conduct of H. Snowden Marshall, United States district attorney for the Southern District of New York. Sections 530–534.**
3. **Investigation of charges against Attorney General Daugherty. Sections 536–538.**
4. **Charges as to collector of port of El Paso. Section 539.**
5. **Charges as to Commissioner of the District of Columbia. Section 548.**
6. **Inquiry as to eligibility of Andrew W. Mellon to serve in Cabinet. Section 540.**
7. **Inquiry as to official conduct of President Hoover. Section 541.**

525. The inquiry into the conduct of Lebbeus R. Wilfley, Judge of United States Court for China.

A Member having risen in his place and impeached Judge Wilfley and offered a resolution providing for an investigation, the House referred the matter to the Judiciary Committee.

In the investigation into the conduct of Judge Wilfley, he appeared before the committee and testified under oath.

The report of a subcommittee was disregarded and was not included as a part of the report of the committee to the House.

The committee, after conducting an investigation, acted adversely on a proposition to impeach Judge Wilfley and the House declined to take further action.

A Member being criticized by the President for instituting impeachment proceedings, rose to a question of personal privilege.

On February 20, 1908,[1] Mr. George E. Waldo, of New York, presented as a privileged matter the following:

> I desire to impeach Lebbeus R. Wilfley, of the United States court of China, of mal and corrupt conduct in office, and of high crimes and misdemeanors, and I present the following articles of impeachment and ask that they may be read at the Clerk's desk.

* Cannon's Precedents, vol. 6, p. 743 (1936).

[1] First session, Sixtieth Congress, Journal, p. 497; Record, 2262.

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The Clerk read the articles of impeachment, which detailed at length the charges upon which the proposed impeachment was based.

Mr. Waldo then submitted a resolution authorizing and directing the Committee on the Judiciary to investigate the charges, and, after debate, made the following motion, which was agreed to:

I move that this resolution and the articles be referred to the Committee on the Judiciary, to report back by resolution within ten days what, if any, proceedings should be taken.

The motion was agreed to.

The investigation was delegated to a subcommittee of the Committee on the Judiciary, which reported to the committee in part as follows:

It is obviously true that an aggregation of entirely legal acts may develop into a system of tyranny and oppression; and that an inequitable exercise of judicial discretion may convert the machinery of justice into an engine of despotic and autocratic power. This may be accomplished without the taint of individual corruption and with a laudable purpose of purifying a community and of inaugurating civic reform.

Terror to evil doers if purchased at the price of judicial fairness and overtrained legal authority is achieved at too great an expense, for it defeats its own high aim and warps the very fabric of the law itself.

Such acts of legal oppression and of abuse of judicial discretion lie at the base of these charges. They are made before the House of Representatives in the form prescribed by law and custom, and are presented as a question of high privilege upon the solemn responsibility of a Member of the House. Charges so presented against this court have a peculiar and dangerous significance. In this case they are dismissed as falling short of impeachable offenses, by what we believe to be sound principles of legal construction, and Judge Wilfley is therefore denied any opportunity of defense. He can file no answer, make no denial, nor explain to the House the legality or necessity for his action.

These charges therefore stand uncontroverted, and if Judge Wilfley's judicial acts in the future are marked by the rigorous and inflexible harshness imputed to him they will hang as a portentous cloud over this new court, impairing his usefulness, impeding the administration of justice, and challenging the integrity of American institutions.

During the investigation Judge Wilfley appeared before the committee and testified under oath.

On May 8, 1908,[2] Mr. Reuben O. Moon, of Pennsylvania, from the Committee on the Judiciary, submitted the following report:

The Committee on the Judiciary, to whom was referred the articles of impeachment of Lebbeus R. Wilfley, judge of the United States court for China, in compliance with the action of the House, begs leave to report that, afer investigation, it is the opinion of the committee that no proceedings should be taken on the said resolutions.

The report was referred, under the rule, to the Committee of the Whole House.

On March 3, 1909,[3] Mr. Waldo rose to a question of personal privilege and said:

Mr. Speaker, on February 20, 1908, at the request of Hon. Lorrin Andrews, late attorney general of Hawaii, and who represented the American lawyers and other American citizens, residents of Shanghai, China, I presented to the House articles of impeachment against Lebbeus R. Wilfley, judge of the United States court for China.

These articles charged judicial outrages and gross abuse of power which, in my judgment, showed Judge Wilfley to be utterly unfit to hold judicial office.

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[2] House Report 1626.
[3] Second session Sixtieth Congress, Record, p. 3813.

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The President, without any investigation of the facts, except to hear Judge Wilfley and his friends, sent to the subcommittee of the Judiciary Committee, which was then investigating the facts, a copy of a letter from himself to Secretary Root, in which the President used this language:

"I have received and read your report of February 29 upon the charges submitted by Lorrin Andrews, under date of November 19, 1907, against Judge Wilfley; it appearing from your report that Congressman Waldo stands sponsor for the charges."

And concluded letter as follows:

"It is not too much to say that this assault on Judge Wilfley in the interest of the vicious and criminal classes is a public scandal."

This was evidently an intentional reflection upon the uprightness of my motives and conduct and an invasion of my privileges as a Member of this House.

Mr. Sereno E. Payne, of New York, made the point of order that the gentleman was not stating a question of personal privilege.

The Speaker [4] sustained the point of order, and Mr. Waldo continued his remarks by unanimous consent.

526. The inquiry into the conduct of Judge Cornelius H. Hanford, United States circuit judge for the western district of Washington, in 1912.

A Member on his authority as a Member of the House impeached Judge Hanford and offered a resolution providing for investigation of charges.

Pending motion to refer a resolution providing for an investigation looking to impeachment the resolution is not open to amendment.

The House referred the charges made against Judge Hanford to the Judiciary Committee for investigation.

During the investigation of Judge Hanford with a view to impeachment, he was represented by counsel who cross-examined witnesses and produced evidence in his behalf.

Judge Hanford having resigned his office, the House discontinued its investigation into his conduct.

The report of the subcommittee, while recommending the discontinuance of impeachment proceedings against Judge Hanford, declared him to be disqualified for his position and recommended acceptance of his resignation.

On June 7, 1912,[5] Mr. Victor L. Berger, of Wisconsin, presented, as a matter of privilege, the following:

Mr. Speaker, I rise to a question of the highest privilege and also of the greatest importance. By virtue of my office as a Member of the House of Representatives, I impeach Cornelius H. Hanford, judge of the western district of the State of Washington, of high crimes and misdemeanors.

I charge him with having annulled, on May 13, 1912, in violation of the Constitution and on a frivolous charge, the naturalization papers of Leonard Oleson.

I charge him with having been guilty of a long series of unlawful and corrupt decisions.

I charge him with having issued in the collusive suit of Augustus Peabody *v.* The Seattle, Renton & Southern Railway, in August, 1911, an injunction in the interests of the company and against the interests of the citizens of Seattle, flagrantly in violation of justice and law.

I charge him with being an habitual drunkard.

I charge him with being morally and temperamentally unfit to hold a judicial position.

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[4] Joseph G. Cannon, of Illinois, Speaker.

[5] Second session Sixty-second Congress, Journal, p. 772; Record, p. 7799.

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Mr. Berger then submitted the following resolution and moved that it be referred to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the official misconduct of Cornelius H. Hanford; whether he has been in a drunken condition while presiding in court; whether he has been guilty of corrupt conduct in office; whether his administration has resulted in injury and wrong to litigants of his court and to others affected by his decisions; and whether he has been guilty of any misbehavior for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said committee.

That the subcommittee shall have the same powers in respect to obtaining testimony as are herein given to the said Committee on the Judiciary.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Samuel W. McCall, of Massachusetts, proposed to amend the resolution by inserting the word "alleged" before the word "misconduct."

A point of order by Mr. James R. Mann, of Illinois, that in view of the motion to refer the resolution it was not open to amendment, was sustained.

Thereupon Mr. Berger asked unanimous consent to amend the resolution as proposed by Mr. McCall. There was no objection and the resolution was so modified. The motion to refer the amendment to the Committee on the Judiciary was then agreed to.

On June 13 [6] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, presented as privileged the report of that committee, with the recommendation that the resolution be amended to read as follows:

That the Committee on the Judiciary be directed to inquire and report whether the action of this House is requisite concerning the official misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and say whether said judge has been in a drunken condition while presiding in court; whether said judge has been guilty of corrupt conduct in office; whether the administration of said judge has resulted in injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.

And in reference to this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee, and shall attend the sitting of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House.

The report was adopted and the resolution as amended was agreed to.

On August 6 [7] Mr. Clayton, from the Committee on the Judiciary, submitted the unanimous report of the committee, incorporating the report of an investigation made by a subcommittee pursuant to the following resolution passed by the committee:

Resolved, That James M. Graham, Walter I. McCoy, and Edwin W. Higgins, members of this committee, be appointed the subcommittee by virtue of the au-

[6] House Report No. 880.
[7] House Report No. 1152.

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thority given under House Resolution No. 576, passed by the House of Representatives on June 13, 1912, authorizing an inquiry into the alleged misconduct of Cornelius H. Hanford, United States judge for the western district of the State of Washington, and that the said subcommittee shall have all the powers authorized by said resolution hereinbefore named.

This report relates:

In pursuance of said resolution, the subcommittee left Washington on June 21, 1912, and reached Seattle the evening of June 25. Wednesday, June 26, was spent in making the necessary preliminary arrangements for proceeding with the hearings, and on Thursday, the 27th, the taking of testimony was begun in a court room of the Federal Building in Seattle, and was concluded on Monday, July 22, 1912. The subcommittee sat every day between those days except Sundays and the Fourth of July, making in all 21 days of actual work, including several evening sessions. Two hundred and three witnesses were examined and 3,291 typewritten pages of testimony were taken.

Immediately upon the arrival of the subcommittee in Seattle, the following communication was addressed to Judge Hanford by Mr. Graham, chairman of the subcommittee.

SEATTLE, WASH., *June 26, 1912.*

DEAR SIR: The subcommittee on the Committee of the Judiciary of the House of Representatives, Washington, D.C., will convene to-morrow June 27, in the court room, Federal Building, in Seattle, for the purpose of taking testimony under House Resolution 576, a copy of which is attached hereto. You can, of course, be present at the session of the subcommittee, in person and by counsel, if you so desire.

JAMES M. GRAHAM, *Chairman.*

Hon. C. H. Hanford.

The report says:

The subcommittee further reports that Judge Hanford was represented during the hearings by able and learned counsel, namely, Mr. E. C. Hughes, Mr. Harold Preston, and Mr. C. W. Dorr, and that they were given wide latitude in the examination of all the witnesses and in the production of evidence on behalf of Judge Hanford, so that the record contains such evidence in defense as counsel desired to offer, as well as the incriminating evidence.

The report continues:

The subcommittee had almost, but not quite, completed the taking of testimony when, at the morning session on Monday, July 22, counsel representing Judge Hanford asked for a conference with the members of the subcommittee, and the request was granted. They then informed the subcommittee that Judge Hanford had concluded to send his resignation to the President.

The subcommittee thereupon decided:

That there was no good reason why the resignation of the judge should not be accepted. And it appears to the committee that the further prosecution of the impeachment proceedings is inadvisable. Among the reasons for this conclusion may be stated in substance the reasons assigned by the subcommittee:

(1) The chief good which successful impeachment proceedings could effect would be the removal of Judge Hanford from the bench. That good his resignation accomplished.

(2) The record of the evidence shows that he is 64 years old his next birthday, and hence not entitled to retire on pay. Therefore, his resignation brings him no emolument or reward and involves no expenditure of public money.

(3) The committee do not think it necessary or advisable to pursue the impeachment further merely for the purpose of making him ineligible to hold office in the future, as his age and the circumstances disclosed by the testimony render such a contingency highly improbable.

(4) Bringing the witnesses from Seattle and vicinity to Washington, a distance of over 3,000 miles, to prosecute an impeachment proceeding before the Senate would involve an expenditure approximating $70,000. This expenditure of public money could not be justified in this case where the judge is now out of office and doubtless will never again be appointed to office.

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The subcommittee further concluded:

On the whole record it clearly appears that Judge Hanford's usefulness as a Federal judge is over; that his personal and judicial conduct disqualify him for that position and that this committee recommend that his resignation be accepted.

The committee therefore recommended the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of the action under House Resolution 576.

Resolved further, That the testimony taken by the subcommittee of the Committee on the Judiciary under the authority conferred by House Resolution 576 be printed as a part of this report and transmitted by the Clerk of the House of Representatives to the Attorney General for his consideration and with the recommendation that the Department of Justice take cognizance thereof, and take whatever action may be deemed advisable in case said testimony discloses or tends to disclose any infractions of the laws of the United States.

On the same day, after brief debate, Mr. Clayton moved to amend the resolution by inserting after the word "printed" the words "as a part of this report." The amendment was agreed to and the resolution as amended was adopted without division.

527. The investigation into the conduct of Judge Emory Speer.

A resolution proposing investigation with a view to impeachment was referred, under the rule, to the appropriate committee.

A resolution proposing investigation with a view to impeachment was considered by unanimous consent.

A subcommittee, with power to send for persons and papers, was sent to Georgia to investigate the conduct of Judge Speer.

During the investigation of Judge Speer, looking to impeachment, he attended each session, accompanied by counsel, and cross-examined witnesses.

The most liberal latitude was allowed in the examination of witnesses before the committee which investigated Judge Speer.

While declining to recommend acquittal, and declaring Judge Speer's acts merited condemnation, the Judiciary Committee remended that no further proceedings be had in the matter.

On August 26, 1913,[8] Mr. Henry D. Clayton, of Alabama, asked unanimous consent for the consideration of the following resolution:

Whereas on the 16th day of August, 1913, the Attorney General of the United States transmitted to the Committee on the Judiciary of the House of Representatives a report of a special examiner duly designated by the Attorney General to investigate various charges of alleged misconduct of Emory Speer, a United States district judge for the southern district of Georgia, which charges had been brought to the attention of the Department of Justice; and

Whereas the charges embodied in said report are accompanied by exhibits and affidavits and are of such grave nature as to warrant further investigation: Therefore be it

Resolved, That the Committee on the Judiciary be, and it is hereby authorized to inquire into and concerning the official conduct of Emory Speer, United States district judge for the southern district of Georgia, touching his conduct in regard to the matters and things set forth in said report; and further to inquire whether said judge has been guilty of any misbehavior for which he should be impeached and report to the House of Representatives the conclusions of the committee in respect thereto, with appropriate recommendations; and said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and to appoint and send a subcommittee whenever and wherever it may be necessary to take testimony for the use of said committee; the said subcommittee, while so employed, shall have the same powers in respect to obtaining testimony as are herein given to said

[8] First session Sixty-third Congress, Journal, p. 254; Record, p. 3777.

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Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee and the process and orders of said subcommittee and shall attend the sittings of the same as ordered and as directed thereby, and that the expense of such investigation shall be paid out of the contingent fund of the House; that said Committee on the Judiciary, or subcommittee thereof, shall have power to sit during the sessions of this House or in vacation.

Mr. James R. Mann, of Illinois, objected and, under the rule, the resolution was referred to the Committee on Rules.

On the following day Mr. Clayton again submitted a unanimous-consent request for consideration of the resolution. There was no objection, and after debate the resolution was agreed to, with the following amendment:

Amend, page 2, by inserting after the word "House," in line 19 and before the semicolon, the following: "On vouchers ordered by the Committee on the Judiciary, signed by the chairman thereof and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof."

On October 2, 1914,[9] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, submitted the report of the majority of that committee on the investigation authorized by the resolution.

The committee incorporate as a part of their report the report of the majority of a subcommittee which conducted the investigation, signed by Mr. Webb and Mr. Louis Fitzhenry, of Illinois. The history of the investigation is thus detailed in the majority report:

Your special subcommittee made a trip to the southern district of Georgia, leaving Washington on the evening of Saturday, January 17, and arriving at Macon, the seat of the court, on the evening of the following day. Monday morning, January 19, at 10 o'clock, the subcommittee opened its public hearings in the United States court room in the Federal Building at Macon, and examined witnesses who were caused to appear for the purpose of giving testimony. These hearings were held continuously throughout the week, ending Saturday, January 24. The committee then went to Savannah, Ga., in said district, and examined witnesses during the entire of the following week, concluding its hearings there on Saturday, January 31.

All of the hearings were public. Judge Speer attended each session of the committee and was accompanied by counsel, who were permitted to cross-examine the several witnesses.

A digest of the testimony of the witnesses examined is appended, and the committee thus summarize the evidence.

The conclusion of the subcommittee, deduced from the evidence taken and from the construction of the precedents of impeachment trials, is that at the present time satisfactory evidence sufficient to support a conviction upon a trial by the Senate is not obtainable.

The report continues:

A phase of the record is that it details a large number of official acts on the part of Judge Speer which are in themselves legal, yet, when taken together, develop into a system tending to approach a condition of tyranny and oppression. There has been an inequitable exercise of judicial discretion, many instances of which have been frequently criticized where the cases in which they were committed have been reviewed by the courts of appeal, while in others litigants were unable, financially, to prosecute appeals. That the power of the court has been exercised in a despotic and autocratic manner by the judge can not be questioned.

[9] House Report No. 1176.

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As to examination of witnesses and admission of evidence, the committee say:

In the conduct of the hearings the committee was extremely liberal and did not confine the witnesses to the giving of technically legal evidence. Some evidence of a hearsay nature was received. The committee felt justified in such a course in the light of the fact that it came to the attention of the committee that many witnesses were apprehensive of the consequences of giving evidence against Judge Speer in the event of his acquittal.

The committee also say:

The record shows instances where the judge, sitting in the trial of criminal cases, apparently forced pleas of guilty from defendants or convictions and there is strong evidence tending to show that in one case, at least, he forced innocent parties to enter such pleas through a fear of the consequences in the event of an unfavorable verdict at the hands of a jury presided over by the judge in the manner peculiar to himself.

The committee, however, decide:

The subcommittee regrets its inability to either recommend a complete acquittal of Judge Speer of all culpability so far as these charges are concerned, on the one hand, or an impeachment on the other. And yet it is persuaded that the competent legal evidence at hand is not sufficient to procure a conviction at the hands of the Senate. But it does feel that the record presents a series of legal oppressions and shows an abuse of judicial discretion which, though falling short of impeachable offenses, demand condemnation and criticism.

If Judge Speer's judicial acts in the future are marked by the rigorous and inflexible harshness shown by this record, these charges hang as a portentous cloud over his court, "impairing his usefulness, impeding the administration of justice, and endangering the integrity of American institutions."

The committee therefore recommend the adoption of the following resolution:

Resolved, That no further proceedings be had with reference to H. Res. 234.

Mr. Andrew J. Volstead, of Minnesota, a member of the subcommittee, in an accompanying minority report concurs in recommending the adoption of the resolution reported by the majority, but takes sharp issue with other conclusions set out in the majority report. After discussing in detail each charge considered in the majority report and warmly controverting conclusions reached by the majority, the minority views say:

While I concur in the recommendations made in the majority report, that no further proceedings be had upon the charges against Judge Speer, I desire to express in as emphatic language as possible my protest against the methods that have been pursued; but I desire to have it distinctly understood that I do not criticize the motives of my associates; for them I have the highest personal regards. In this investigation no effort was made to protect the judge against mere slander and abuse that could serve no other purpose than to disgrace and humiliate him. Every enemy that 29 years on the bench had produced was invited and eagerly encouraged to detail his grievance and to supplement that with all sorts of innuendoes, insinuations, and insulting opinions, utterly illegal as evidence and incompetent for any proper purpose. To add to this, the methods pursued in framing the majority report are equally reprehensible. It is apparent throughout that nothing has been considered pertinent that did not support some charge against the judge. As matters of explanation or denial do not meet this requirement, they are quite generally omitted, not only from the findings, but also from the summary of the evidence. Still this is not all. Although the majority report announces that there is not sufficient evidence to support any of the charges, that announcement is in the nature of a "Scotch verdict," or worse, because it is accompanied in almost every instance with an insinuation that the judge may be guilty, notwithstanding such finding. If anything could be more unfair or unjust, it is difficult to imagine what it could be.

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The minority views conclude:

It is not necessary to say anything in commendation of Judge Speer. The last line in the majority report, recommending no further action upon the charges, is despite all criticism to the contrary, a complete vindication. It would not have been written if the evidence had pointed to anything worthy of real criticism. In conclusion let me add, the day will come when Judge Speer will be remembered with pride by the people of Georgia, not only for his ability and integrity, but especially for what Mr. Wimberly called his many beautiful acts of mercy to the oppressed.

On October 21, 1914, the House agreed to the majority report without debate or division.

528. The investigation into the conduct of Daniel Thew Wright, associate justice of the Supreme Court of the District of Columbia.

A Member, rising in his place, impeached Judge Wright on his responsibility as a Member of the House.

A committee charged with an investigation looking to impeachment delegated the inquiry to a subcommittee.

During the investigation of Judge Wright with a view to impeachment he was permitted to appear before the committee with counsel.

Judge Wright having resigned his office before final report by the committee charged with the investigation, the House agreed to the recommendation of the committee and that it be discharged.

On March 20, 1914,[10] Mr. Frank Park, of Georgia, rose in his place and proposed as a matter of privilege the impeachment of Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia. In the absence of a quorum, the House adjourned.

On the following day, immediately after the reading of the Journal, Mr. Park again rose and presented, as privileged, the following:

Mr. Speaker, at the adjournment hour on yesterday I brought to the attention of the House certain charges which I was about to deliver to the House.

Mr. Speaker, I rise to a question of the highest privilege and of the greatest importance. By virtue of my office as a Member of the House of Representatives I impeach Daniel Thew Wright, an associate justice of the Supreme Court of the District of Columbia, of high crimes and misdemeanors.

I charge him with having accepted favors from practitioners at the bar of his court and of having permitted counsel for a street railway company to indorse his notes while said counsel was retained by said street railway company in business and causes before his court.

I charge him with performing the service of a lawyer and accepting a fee during his tenure of judicial office, in violation of the statute of the United States.

I charge him with collecting and wrongfully appropriating other people's money.

I charge him with purposely changing the record to prevent reversal of causes wherein he presided.

I charge him with bearing deadly weapons in violation of law.

I charge him with judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice."

I charge him with arbitrarily revoking, without legal right, the order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver.

I charge him with being guilty of various other acts of personal and judicial misconduct for which he should be impeached.

I charge him with being morally and temperamentally unfit to hold judicial office.

[10] Second session Sixty-third Congress, Record, p. 5204.

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Mr. Park continued:

Mr. Speaker, in accordance with former proceedings before the House in like cases, I submit the following resolution which I send to the Clerk's desk.

The resolution was as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright; whether he has accepted favors from lawyers appearing before him; whether he has permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of lawyer and accepted a fee during his tenure of judicial office, in violation of the statutes of the United States; whether he has collected and wrongfully appropriated other people's money; whether he has purposely changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he is guilty of judicial misconduct in the trial of a writ of habeas corpus to an extent which provoked a reviewing court of the District of Columbia to justly characterize the trial as a "travesty of justice"; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction, appointing three receivers, so as to favor his friend by appointing him sole receiver; whether he is morally and temperamentally unfit to hold judicial office; and whether he has been guilty of various acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; and the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

On motion of Mr. Park, the resolution was referred to the Committee on the Judiciary without debate.

On April 10[11] Mr. Henry D. Clayton, of Alabama, from the Committee on the Judiciary, submitted, as privileged, the following:

The Committee on the Judiciary, having had under consideration House resolution No. 446 report the same back with the recommendation that it be amended to read as follows, and as so amended that it be adopted:

"*Resolved*. That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Daniel Thew Wright, an associated justice of the Supreme Court of the District of Columbia; whether he has corruptly accepted favors from lawyers appearing before him; whether he has corruptly permitted counsel for a street railway company to indorse his notes while said counsel was retained in business and causes before his court; whether he has performed the services of a lawyer and accepted a fee during his tenure of judicial office, in violation of the statute of the United States; whether he has purposely and corruptly changed the record in order to prevent reversal of causes wherein he presided; whether he has borne deadly weapons in violation of law; whether he has arbitrarily revoked, without legal right, an order of a judge of concurrent jurisdiction appointing three receivers, so as to favor his friend by appointing him sole receiver; and whether said judge has been guilty of any misbehavior for which he should be impeached.

"And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said subcommittee while so employed shall have the same powers in respect to obtaining testimony

[11] House Report No. 514.

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as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee and shall attend the sitting of the same as ordered and directed thereby. The Speaker shall have authority to sign and the Clerk to attest subpœnas for any witness or witnesses.

"The expense of such investigation shall be paid out of the contingent fund of the House."

In response to an inquiry as to wherein the resolution proposed by the committee differed from the original resolution, Mr. Clayton said:

It does not differ in any material respect, but it puts it in better form.

On October 14 [12] Mr. Jack Beall, of Texas, from the Committee on the Judiciary, submitted, through the Clerk of the House, the final report of that committee.

The committee reported the delegation of the inquiry to a subcommittee, the report of which is appended to and made a part of the report of the committee.

The subcommittee report says:

On May 1, 1914, the subcommittee began the examination of witnesses and held sessions on 43 days, including three night sessions, as well as numerous conferences with Mr. Justice Wright and his counsel, the taking of testimony being concluded on August 26, 1914. Such of the testimony and exhibits pertinent to the charges affecting Associate Justice Wright's official conduct that your subcommittee deemed necessary to print have been printed and a copy thereof is submitted herewith. Associate Justice Wright was duly notified and was present at each session of the subcommittee in person and was represented by counsel, Mr. J. J. Darlington, who was given opportunity to cross-examine the witnesses. Several witnesses were called on behalf of Mr. Justice Wright and examined by his counsel.

The committee report adds:

On October 6, 1914, Mr. Justice Wright tendered his resignation to the President, which was duly accepted October 7, 1914, to become effective November 15, 1914, and that because Judge Wright is not eligible under the law to retire with pay this resignation, when it becomes effective, will entirely separate him from the public service. Because of this fact the committee is of the opinion that further proceedings under House resolution 446 are unnecessary.

The committee therefore recommend the adoption of the following resolution:

Resolved, That the Committee on the Judiciary be discharged from further consideration of and action under House resolution 446.

The report of the committee was, under the rules, referred to the Committee of the Whole House on the state of the Union. On March 3 [13] Mr. Beall moved the adoption of the report. The motion was agreed to without debate or division.

529. The investigation into the conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia in 1915.

A Member having presented charges against Judge Dayton, the House ordered an investigation.

In the investigation of Judge Dayton the respondent appeared before the subcommittee charged with the investigation and made an extended statement concerning the matters involved.

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[12] House Report No. 1191.
[13] Third session Sixty-third Congress, Journal, p. 301; Record, p. 5485.

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The Judiciary Committee authorized to make an investigation committed the matter to a subcommittee, the report of which was made a part of the committee report to the House.

A subcommittee visited West Virginia and took testimony in the case of Judge Dayton.

While the subcommittee, in its report, criticized Judge Dayton, it concluded there was little possibility of maintaining impeachment proceedings.

Minority views, although agreeing with the majority report in the findings of fact, held that the evidence warranted further proceedings toward impeachment.

The committee and the House acted adversely on the proposition to impeach Judge Dayton.

On May 11, 1914,[14] Mr. M. M. Neeley, of West Virginia, submitted a resolution directing the Committee on the Judiciary to make an investigation of the official conduct of Alston G. Dayton, United States district judge for the northern district of West Virginia. Under the rule, the resolution was referred to the Committee on Rules.

On June 12 [15] Mr. Neeley rose in his place and presented as a privileged matter, the following:

Mr. Speaker, I rise to a question of the highest privilege. By virtue of my office as a Member of the House of Representatives, I impeach Alston G. Dayton, Judge of the District Court of the United States for the Northern District of West Virginia, of high crimes and misdemeanors.

At the conclusion of his arraignment, which consisted of 26 separate charges, Mr. Neeley offered the following:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of the House is necessary concerning the alleged official misconduct of Alston G. Dayton; whether he has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has had summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has assisted his son, Arthur Dayton, in the preparation of the defense and trial of numerous cases against certain corporations for which the said Arthur Dayton is attorney, which cases were tried before him, the said Alston G. Dayton, and whether he has unlawfully used his high office and influence in behalf of said corporations; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has used the funds of the United States for an improper purpose; whether he has violated the acts of Congress regulating the selection of jurors; whether he has actively engaged in politics and used his high office as judge to further the political ambitions and aspirations of his friends; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peacefully assemble under the laws of the United States and the State of West Virginia; whether he has wrongfully expressed his own opinions in charging grand juries in his court; whether he has conspired with certain corporations and individuals in the formation of a carbon trust in violation of law; whether he has unlawfully had an order entered staying a proceeding the object of which was the condemnation of a lot in Philippi, W. Va., for a site for a Federal building; whether he has publicly denounced the President of the United States from the bench and before a jury; whether he has unlawfully used the funds of the United States Government for

[14] Second session Sixty-third Congress, Record, p. 8417.
[15] Journal, p. 645; Record, p. 10327.

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his own private use; whether he has wrongfully collected from the Government funds as expenses not due or allowed to him under the statute; whether he has wrongfully kept open the books of his court at Philippi, W. Va.; whether he has, in open court and before a jury, accused witnesses of swearing falsely in cases then on trial before him; whether he has directed the marshal of his district to refuse to pay the fees of witnesses whom he had accused of testifying falsely; whether he has refused to enforce certain laws of the United States; whether he has openly denounced and criticised the United States Supreme Court; whether he has discharged jurors for rendering verdicts not agreeable to him; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has refused to permit certain defendants in a case in his court to have an interpreter; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; whether he is so prejudiced as to unfit him temperamentally to hold a judicial office; and whether he has been guilty of various other acts of personal and judicial misconduct for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk and stenographer, and to appoint and send a subcommittee whenever and wherever necessary to take testimony for the use of said subcommittee.

That the subcommittee shall have the same power in respect to obtaining testimony as is herein given to the said Committee on the Judiciary; that the Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

That the expenses incurred in this investigation shall be paid out of the contingent fund of the House.

Mr. Neeley moved that the resolution be referred to the Committee on the Judiciary without debate, and on that motion demanded the previous question.

The motion was agreed to without division.

On February 9, 1915,[16] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, reported the resolution back, with the recommendation that it be amended to read as follows:

Resolved, That the Committee on the Judiciary be directed to inquire and report whether the action of this House is necessary concerning the alleged official misbehavior of Alston G. Dayton, United States district judge for the northern district of West Virginia; whether he, the said Alston G. Dayton, has unlawfully conspired with certain corporations and individuals to bring about the removal from office of the late John J. Jackson, judge of the District Court of the United States for the Northern District of West Virginia; whether he has shown marked favoritism to certain corporations having extensive litigation in his court; whether he has summoned on juries in his court persons connected with certain corporations to which he has shown marked favoritism during his term of office; whether he has abused his power and influence as judge to further the interests of his son, Arthur Dayton; whether he has violated the acts of Congress regulating the selection of jurors; whether he has lent his services as judge to the coal operators of West Virginia by improperly issuing injunctions; whether he has shown hatred and bitterness toward miners on trial in his court; whether he has used his office as judge to discourage and prevent said miners from exercising their lawful right to organize and peaceably assemble under the laws of the United States and the State of West Virginia; whether he has conspired with certain corporations and individuals in the formation of a carbon trust, in violation of law; whether he has openly stated that he would not permit the United Mine Workers of America to exist within the jurisdiction of his court; whether he has stated in open court that the United Mine Workers of America are criminal conspirators; and whether he has been guilty of any misbehavior for which he should be impeached.

And in making this investigation the said committee is hereby authorized to send for persons and papers, administer oaths, take testimony, employ a clerk and stenographer if necessary, and is also authorized to appoint a subcommittee to act for and on behalf of the whole committee whenever and wherever it may be deemed advisable to take testimony for the use of said committee. The said sub-

[16] House Report No. 1381.

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committee while so employed shall have the same powers in respect to obtaining testimony as are herein given to said Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall serve the process of said committee or subcommittee, and shall attend the sittings of the same as ordered and directed thereby.

The Speaker shall have authority to sign and the Clerk to attest subpoenas for any witness or witnesses.

The expense of such investigation shall be paid out of the contingent fund of the House on vouchers approved by the chairman of the Judiciary Committee and approved by the Committee on Accounts and evidenced by the signature of the chairman thereof.

The amendment recommended by the committee was agreed to, and the resolution as amended was unanimously adopted.

On March 3,[17] Mr. Warren Gard, of Ohio, from the Committee on the Judiciary, submitted a report incorporating the report of a majority of the subcommittee to which the investigation had been committed, accompanied by minority views signed by Mr. Daniel J. McGillicuddy, of Maine, a member of the subcommittee.

The report of the majority of the subcommittee is prefaced as follows:

The subcommittee appointed by the Committee on the Judiciary to make investigation of the charges contained in the foregoing resolution heard the testimony of numerous witnesses in Parkersburg and Wheeling, W. Va., and in Washington, D.C., on February 12, 13, 15, 16, 17, 22, 23, 24, and 26, at all of which hearings, except that of February 26 last, the Hon. A. G. Dayton, respondent, was present in person and attended by legal counsel; and on February 26 the hearing was had with the consent and approval of said Hon. A. G. Dayton, who was represented at that hearing by legal counsel.

The Hon. A. G. Dayton appeared before the subcommittee and made full and extended statement of and concerning the matters involved in said investigation.

The witnesses and respondent were each and all sworn, their evidence taken by shorthand reporters, the evidence reduced to writing and is on the file with this committee.

The report then takes up the items of impeachment in their order and summarizes the evidence adduced on each charge.

The conclusion reached by the majority, after hearing the testimony, is that:

This evidence shows many matters of individual bad taste on the part of Judge Dayton, some not of that high standard of judicial ethics which should crown the Federal judiciary, but a careful consideration of all the evidence and attendant circumstances convinces us that there is little possibility of maintaining to a conclusion of guilt the charges made, and impels us therefore to recommend that there be no further proceedings herein.

Mr. McGillicuddy filed the following minority views:

I concur with my colleagues in the above findings of fact, but I do not concur in the recommendation that no further proceedings be had, as it is my opinion that the evidence taken by the subcommittee and findings of fact above made warrant further proceedings looking toward impeachment.

The committee recommend:

The Committee on the Judiciary considered the report of said subcommittee and the evidence thereon and came to the conclusion that no further proceedings should be had with reference to said resolution, and the Committee on the Judiciary beg to report the same to the House and recommend that no further proceedings be had with reference to said resolution.

The report was agreed to without debate or division.

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[17] House Report No. 1490.

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530. The investigation into the conduct of H. Snowden Marshall,[18] United States district attorney for the southern district of New York.

The House declined to order an investigation of District Attorney Marshall on evidence presented by a Member and referred the subject to a committee.

Form of resolution providing for an investigation by the Judiciary Committee and authorizing a subcommittee to exercise powers delegated to the committee.

On January 12, 1916,[19] Mr. Frank Buchanan, of Illinois, presented, as a privileged matter, a resolution detailing at length numerous charges alleging official misconduct on the part of H. Snowden Marshall, United States district attorney for the southern district of New York, and directing the Committee on the Judiciary to conduct an investigation of the charges and report their conclusions to the House.

After debate, on motion of Mr. John J. Fitzgerald, of New York, this resolution was referred to the Committee on the Judiciary.

On January 27[20] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, offered, as privileged, the following resolution:

Resolved, That the Committee on the Judiciary in continuing their consideration of House Resolution 90 be authorized and empowered to send for persons and papers, to subpoena witnesses, to administer oaths to such witnesses, and take their testimony.

The said committee is also authorized to appoint a subcommittee to act for and on behalf of the whole committee wherever it may be deemed advisable to take testimony for said committee. In case such subcommittee is appointed it shall have the same powers in respect to obtaining testimony as are herein given to the Committee on the Judiciary, with a sergeant at arms, by himself or deputy, who shall attend the sittings of such subcommittee and serve the process of same.

In case the Committee on the Judiciary or a subcommittee thereof deems it necessary it may employ such clerks and stenographers as are required to carry out the authority given in this resolution, and the expenses so incurred shall be paid out of the contingent fund of the House.

The Speaker of the House of Representatives shall have authority to sign, and the Clerk thereof to attest, subpoenas for witnesses, and the Sergeant at Arms or a deputy shall serve them.

Mr. Finis J. Garrett, of Tennessee, raised a question as to the privilege of the resolution, when, on motion of Mr. Webb, the resolution was considered by unanimous consent.

Mr. Webb said:

Mr. Speaker, the Committee on the Judiciary has had under consideration House Resolution No. 90, which was referred to that committee some 10 days ago. The committee has not come to any conclusion yet on the resolution, but feels that it should ask the House for the authority to subpoena some witnesses before it that might throw some light upon the charges made. The resolution was unanimously adopted by the Committee on the Judiciary to-day, and I trust that it may pass and that the committee may secure the authority, which it will immediately exercise.

The resolution was agreed to.

531. The case of H. Snowden Marshall, continued.

A witness having refused to testify before a subcommittee was arrested and detained in custody.

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[18] For preliminary proceedings in this case see section 468 of this volume.
[19] First session Sixty-fourth Congress, Journal, p. 204; Record, p. 963.
[20] Record, p. 1658.

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The action of a subcommittee in arresting a recalcitrant witness having been criticized in a letter addressed to the chairman, the committee reported the proceedings to the House with recommendations for an investigation.

Instance in which the House authorized an investigation of purported violations of its privileges and its power to punish for contempt.

On April 5, 1916,[21] Mr. Edwin Yates Webb, of North Carolina, from the Committee on the Judiciary, as a question of privilege, reported:

While considering House Resolution 90 and House Resolution 110, on the 31st day of January, 1916, the Committee on the Judiciary authorized the chairman to appoint a subcommittee of three to execute the purposes of House Resolution 110 to act for and on behalf of the full committee wherever it may be deemed advisable to take testimony for said committee, and on February 1, 1916, the chairman appointed Messrs. Charles C. Carlin, Warren Gard, and John M. Nelson as members of such subcommittee.

Thereafter the said subcommittee organized and heard the testimony of certain witnesses in the Judiciary Committee rooms in the city of Washington. The subcommittee determined, for its further information and in carrying out the duties assigned it under the resolution of the House of Representatives, that it should hear the testimony of certain other witnesses in the city of New York, and on the 28th day of February, 1916, the said subcommittee, under subpoenas duly signed by the Speaker of the House of Representatives and attested by the Clerk thereof, caused certain witnesses to be brought before it, in the Federal post-office buildnig in the city of New York, and continued the examination of witnesses upon said charges up to and including the 4th day of March, 1916.

On the 3d day of March, 1916, there appeared in a New York newspaper an article containing among other things, the following language:

"It is the belief in the district attorney's office that the real aim of the Congress investigation is to put a stop to the criminal investigation of the pro-German partisans."

On the 3d of March, 1916, the subcommittee called before it one, Leonard R. Holme, who testified to the subcommittee that he wrote the article containing the foregoing language, but when asked whether or not he conferred with anybody in the district attorney's office before the article was written replied that he declined to give the source of his information. The chairman of the subcommittee then propounded this question to the witness, "Did you confer with Mr. Marshall before you wrote this article?" To which the witness replied, "I respectfully decline to answer the question, sir." The chairman of the subcommittee then propounded the following question to him, "Did you confer with anybody in Mr. Marshall's office?" To which the witness replied, "I respectfully decline to answer that question, sir."

Whereupon, the Sergeant at Arms was directed by the chairman of the subcommittee to take charge of the witness and keep him in custody until the further order of the committee.

The report appends an excerpt from the transcript of the testimony by Witness Holme before the subcommittee and continues:

On Saturday, the 4th day of March, 1916, the said H. Snowden Marshall, as district attorney for the southern district of New York, caused to be transmitted to C. C. Carlin, chairman of said subcommittee, then in the performance of its duties, as required by the House of Representatives, the following letter:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 4, 1916.

SIR: Yesterday afternoon, as I am informed, your honorable committee ordered the arrest of Mr. L. R. Holme, a representative of a newspaper which had published an article at which you took offense. The unfortunate gentleman of the press was placed in custody under your orders. He was taken to the United

[21] First session Sixty-fourth Congress, House Report No. 494.

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States marshal to be placed in confinement (I do not understand whether his sentence was to be one day or a dozen years). The marshal very properly declined to receive the prisoner. This left you at a loss, and I am advised that you tried to work your way out of the awkward situation by having Mr. Holme brought back and telling him that you were disposed to be "kind" to him and then discharged him for the purpose of avoiding unpleasant consequences to yourselves.

You are exploiting charges against me of oppressive conduct toward a member of your honorable body who is charged with a violation of law and of oppressive conduct on my part toward shysters in the blackmailing and bankruptcy business.

I may be able to lighten your labors by offering to resign if you can indicate anything I ever did that remotely approximates the lawless tyranny of your order of arrest of Mr. Holme.

The supposed justification of your order that Mr. Holme be placed in custody was his refusal to answer the question you asked as to where he got the information on which was based the article which displeased you.

It is not necessary for you to place anyone under arrest in order to get the answers to the question which you asked Mr. Holme, because I can and will answer it. I gave Mr. Holme information, part of which be published and from which he made deductions, so that if your honorable committee has a grievance it is against me and not against him.

What I told him was about as follows:

I said that your expedition to this town was not an investigation conducted in good faith, but was a deliberate effort to intimidate any district attorney who had the temerity to present charges against one of your honorable body.

I said that your whole proceeding here was irregular and extraordinary; that I had never heard of such conduct of an impeachment proceeding; that charges of this sort were not usually heard in public until the House of Representatives had considered them and were willing to stand back of them.

I pointed out to him that you, contrary to usual practice, had come here and had held public hearings; that among your witnesses you had invited every rogue that you could lay your hands on to come before you and blackguard and slander me and my assistants under the full privilege of testifying before a congressional committee.

I told him that you had called one of my junior assistants before you and had attempted to make it publicly appear that his refusal to answer your questions as to what occurred in the grand-jury room in the Buchanan case was due solely to my orders. I said that at the time you attempted to convey this public impression you knew that it was misleading because I had been asked by you to produce the minutes of the grand jury and had been instructed by the Attorney General not to comply with your request, as you well know. I showed him the telegram of the Attorney General to me and showed him a copy of my letter to you, dated February 29, 1916, in which I sent you a copy of the telegram of the Attorney General instructing me not to give you the grand-jury minutes.

I told him that you were traveling around in your alleged investigation of me with Buchanan's counsel, Walsh and David Slade, in constant conference with you. I said that I believed that every word of the evidence, whether in so-called secret sessions or not, had been placed at the disposal of these worthies, and that I would be just as willing to give the grand-jury minutes to a defendant as to give them to your honorable subcommittee.

I told him that I did not share the views which seemed to prevail in your subcommittee on this subject. I said that I regarded a Member of Congress who would take money for an unlawful purpose from any foreign agent as a traitor, and that it was a great pity that such a person could only be indicted under the Sherman law, which carries only one year in jail as punishment.

I said that it was incomprehensible to me how your honorable subcommittee should rush to the assistance of an indicted defendant; how you had apparently resolved to prevent prosecution by causing the district attorney in charge to be publicly slandered.

I told him that I would not permit the prosecution of the persons whose cause you had apparently espoused to be impeded by you; I said that if you wanted the minutes of the grand jury in any case, you would not get them as long as I remained in office.

You will observe from the foregoing statement that what Mr. Holme published may have been based on what I said. If you have any quarrel, it is with me, and not with him.

It is amazing to me to think that you supposed that I did not understand what you have been attempting to do during your visit here. I realized that your

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effort was to ruin me and my office by publishing with your full approval the complaints of various persons who have run afoul of the criminal law under my administration. Your subcommittee has endeavored by insulting questions to my assistants and others, by giving publicity and countenance to the charges of rascals and by refusing to listen to the truth and refusing to examine public records to which your attention was directed, to publicly disgrace me and my office.

I propose to make this letter public.

Respectfully,

H. SNOWDEN MARSHALL,
United States Attorney.

Hon. C. C. CARLIN,
Chairman Subcommittee of the Judiciary Committee of the House of Representatives, 323 Federal Building, New York, N.Y.

The report continues:

At the same time or before this letter was sent to the subcommittee, it was given to the newspapers and published by them.

On the 9th day of March 1916, the subcommittee aforesaid, through its chairman, Hon. C. C. Carlin, submitted to the Committee on the Judiciary the foregoing letter of H. Snowden Marshall.

On or about the 11th day of March, 1916, the following letter was received by the chairman of the Judiciary Committee and immediately laid before the full committee:

DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY'S OFFICE,
New York, March 10, 1916.

Hon. EDWIN Y. WEBB,
Chairman of the Judiciary Committee,
House of Representatives, Washington, D.C.

DEAR SIR: Referring to my letter of March 4, addressed to the chairman of the subcommittee which has recently taken testimony in New York concerning my administration of my office, I notice from the press that some persons appear to have construed my statements as directed toward your honorable committee as a whole. I beg to advise you that the criticisms in that letter were addressed to the methods pursued by the subcommittee. I do not retract nor modify any of those criticisms. But I did not intend (nor do I think my letter should be so construed) to reflect in any way upon the Judiciary Committee, nor did I question the power of the House of Representatives to order such an investigation.

If you and the other members of your committee, for whom I have high respect, have gained the impression that my letter carried any personal reflection upon your honorable committee, it gives me pleasure to assure you that I had no such purpose.

Respectfully,

H. SNOWDEN MARSHALL.

The report of the committee concludes:

The Judiciary Committee has carefully considered said letters in the light of congressional and judicial precedents as touching the prerogatives of the House of Representatives and its Members, and the committee has come to the determination that said letters, their publication and attendant circumstances, are of such nature, that they should be called to the attention of the House. For obvious reasons the committee deems it advisable to take this step rather than to report directly upon the facts and the law in the case. I am, therefore, directed by the committee to report the whole matter to the House of Representatives, with the recommendation that a select committee of five be appointed by the Speaker to report upon the facts in this case; the violations, if any, of the privileges of the House or the Committee on the Judiciary or the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, to the end that the privileges of the House shall be maintained and the rights of the Members protected in the performance of their official duties.

The House agreed to the following resolution:

Resolved, That a select committee of five members be appointed forthwith by the Speaker to consider the report, in the nature of a statement, from the

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Judiciary Committee with reference to certain conduct of H. Snowden Marshall, and to report to the House of Representatives the facts in the case; the violations, if any, of the privileges of the House of Representatives or of the Committee on the Judiciary, or of the subcommittee thereof; the power of the House to punish for contempt; and the procedure in contempt proceedings, in case they find a contempt has been committed, to the end that the privileges of the House shall be maintained and the rights of Members protected in the performance of their official duties.

The select committee shall have the power to send for persons and papers and shall submit its report to the House not later than April fourteenth, nineteen hundred and sixteen.

The Speaker appointed as members of this committee Messrs. John A. Moon, of Tennessee; John N. Garner, of Texas; Charles R. Crisp, of Georgia; John A. Sterling, of Illinois; and Irvine L. Lenroot, of Wisconsin.

532. The case of H. Snowden Marshall, continued.

By direction of the House, the Speaker issued and the Sergeant at Arms served a warrant for the arrest of a person charged with contempt of the House.

A person arrested by order of the House secured a writ of habeas corpus and was released on his own recognizance.

Discussion of the delegation of power to subcommittees.

On April 14, 1916,[22] Mr. Moon, from the select committee, presented the report of that committee, accompanied by a transcript of testimony.

The report quotes the following letter addressed to H. Snowden Marshall by direction of the committee:

APRIL 7, 1916.

Hon. H. SNOWDEN MARSHALL,
United States District Attorney for the
Southern District of New York, New York City.

DEAR SIR: Inclosed is House Resolution 193 and Report No. 494, which explain themselves. The select committee appointed by the Speaker of the House of Representatives are now engaged in the investigation of the matters referred to herein. We will be glad to have you appear before us, if you so desire, at the rooms of the Committee on the Post Office and Post Roads of the House of Representatives, in the Capitol Building, Washington, D.C., on Monday, April 10, 1916, at 10 o'clock a.m., and make such statement as you may desire before the committee touching this matter. As the time of the committee is limited in which to report, you will oblige us by advising by wire whether you desire to be present or not. This communication is made to you by order of the select committee.

Very truly yours,

JOHN A. MOON,
Chairman Select Committee.

In response to this letter, Judge Marshall appeared before the committee, and the report incorporates the following findings reached by the committee after hearing his testimony:

We conclude and find that the letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the subcommittee of the Judiciary Committee of the House of Representatives, on March 4, 1916, is as a whole and in several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.

We find that Mr. Marshall's testimony is an aggravation of his contempt.

In discussing the delegation of power to subcommittees, the report says:

[22] First session Sixty-fourth Congress, H. Rept. 544.

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No legislative body consisting of a large number of members can move from one place to another to take testimony in cases where its power and authority or dignity is called into question. Its power in this respect must, therefore, necessarily be delegated to one of its committees or a subcommittee by a proper resolution, as was done in this case. This delegation of power to a subcommittee is lawful, and carries with it all of the authority belonging to the House in the execution of the immediate purpose for which the committee was called into existence.

Any conduct that would be a violation of the privileges of the House if directed against the House in the first place, would be a contempt against the House and a breach of its privileges when directed against one of its committees or subcommittees appointed by authority of the House to do a specific thing and acting within its delegated power and in the scope of its authority. Any other view would leave the House powerless to protect its honor and dignity and its constitutional rights. It would set at defiance the sovereignty of the people represented by the House. That the House as a representative body has the inherent power to protect itself from defamation and all slanderous and lawless conduct that would bring it into reproach and popular contempt, whether uttered or committed in the presence of the House or elsewhere, has not been disputed since the case of Anderson *v.* Dunn. Offensive, abusive, and defamatory language against a committee of the House acting within its authority is offensive, abusive, and defamatory against the House, and is just as dangerous to the integrity of that body as if had been committed in its presence.

As to the power of the House to punish for contempt, the committee decides:

We find, therefore, that the House has full power to punish for contempt committed in its presence, or not within its presence, by publication of matter that is defamatory against it or its committee lawfully constituted and acting within its authority. We find as stated that the privileges of the House in this case were breached by H. Snowden Marshall by the letter which he wrote to the subcommittee. This letter as a whole is insulting, defamatory, and a clear expression of contempt. The purpose for which it was written and printed was to defame—to bring into ridicule and contempt—the subcommittee of the Judiciary Committee having under investigation the impeachment charges against H. Snowden Marshall. It was as much a violation of the privileges of the House to have directed a scurrilous and offensive letter of this character against one of its committees, as if it had been addressed directly to the House.

It is proper for us to say that Mr. Marshall was given every opportunity to retract or apologize or in some way modify his statements contained in the letter. Parts of the letter containing the most defamatory matter were read to him, and he was asked if he meant to still say that that was true. He reaffirmed and reasserted the same, only with the statement that it was intended to criticize the procedure of the subcommittee and was not intended as a contempt of the House. It is clear that if the House could tolerate such a construction of this letter and could tolerate such vile and defamatory language against one of its committees, it would be powerless to conduct impeachment trials or perform any other duty without living under the disgrace of the contempt that would necessarily come to a body so unmindful of its duties to the people as to permit such insult and injury.

The committee therefore recommend:

As to the method of procedure that should be followed in the House in trial of the said H. Snowden Marshall for the contempt which the committee finds that he has committed, we recommend the passage of the following resolution:

Resolved, That the Speaker do issue this warrant, directed to the Sergeant at Arms, commanding him to take in custody, wherever to be found, the body of H. Snowden Marshall, of the State of New York, and to proceed forthwith to bring the said H. Snowden Marshall to the bar of the House of Representatives, to answer the charge that he, on March 4, 1916, in the city of New York, did violate the privileges of the House of Representatives of the United States by writing and causing to be published the following letter. (The letter is here quoted in full.)

Resolved, That the said H. Snowden Marshall, in writing and publishing said letter, was guilty of a breach of the privileges and a contempt of the House of Representatives, and that the said H. Snowden Marshall be furnished with a copy

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of this resolution, and a copy of the report of the select committee of the House of Representatives, appointed to investigate the charges made against him in the House of Representatives.

Resolved, That when H. Snowden Marshall shall be brought to the bar of the House, to answer the charge of having violated the privileges of the House of Representatives, as afore set out, the Speaker shall then cause to be read to said H. Snowden Marshall the findings of fact and findings of law by the special committee of the House, charged with the duty of investigating whether or not the said H. Snowden Marshall had violated the privileges of the House of Representatives, or was in contempt of same; the Speaker shall then inquire of said H. Snowden Marshall if he desires to be heard, and to have counsel on the charge of being in contempt of the House of Representatives for having violated its privileges. If the said H. Snowden Marshall desires to avail himself of either of these privileges, the same shall be granted him. If not, the House shall thereupon proceed to take order in the matter.

This report was considered in the House on June 20. In the course of the debate, Mr. Andrew J. Montague, of Virginia, said:

Mr. Speaker, I beg to submit to this House, without fear of successful contradiction, that neither this House nor the Senate has ever heretofore undertaken to exercise jurisdiction in contempt proceedings of a case of the character we are now considering. No slander or libel of this body has ever heretofore been treated as contempt by this body. This statement can not be controverted. Therefore we are driven to the unfortunate predicament of making a new law to fit a new case. The report attempts to declare that to be contempt which has never heretofore been adjudged to be contempt by either House of Congress. In other words, Mr. Speaker, we now seek to declare that unlawful which when heretofore done was lawful.

After extended debate, the resolutions recommended by the committee were agreed to—yeas 209, nays 85.

On June 22 the Speaker announced:

The Chair directs the reporter to record the fact to go in the Record that the Speaker signs this warrant for H. Snowden Marshall in the presence of the House.

The Chair does not think it necessary, but some gentlemen did.

On June 26 [23] the Sergeant at Arms addressed a letter to the Speaker advising him that in compliance with this warrant he had arrested Judge Snowden, who had thereupon secured a writ of habeas corpus and had been released on his own recognizance. On the same day the House agreed to the following:

Resolved, That the Sergeant at Arms of the House is hereby authorized to employ legal counsel in the matter of the proceedings against H. Snowden Marshall, United States district attorney for the southern district of New York, for contempt, the expenses to be paid out of the contingent fund of the House.

The hearing in the habeas corpus proceedings was held in the United States District Court for the Southern District of New York, which dismissed the writ of habeas corpus, remanded Judge Marshall to the custody of the Sergeant at Arms and directed that he be brought before the House.[24] The relator thereupon appealed the case to the Supreme court.

533. The case of H. Snowden Marshall, continued.

A committee, after investigation of impeachment charges referred to it by the House, recommended that no further action be taken thereon.

[23] Record, p. 10872.
[24] First session Sixty-fourth Congress, Record, p. 11691.

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On August 4, 1916,[25] Mr. Webb, from the Committee on the Judiciary, submitted the report of the committee on the resolution, proposing impeachment of H. Snowden Marshall, recommending that no further proceedings be had in the matter. The report was referred to the House Calendar and was not considered by the House.

534. The case of H. Snowden Marshall, continued.

Decision by the Supreme Court on the power of the House to punish for contempt.

The House is without constitutional jurisdiction to punish summarily for contempt in certain cases.

The power to punish contempt vested in the House of Commons is not conferred by the Constitution upon Congress.

While power to punish contempt is not expressly granted to Congress by the Constitution, it has the implied power to preserve itself and to deal by way of contempt with direct obstructions to its legislative duties.

The implied power to punish for contempt is limited to imprisonment and such imprisonment may not extend beyond the session of the body in which the contempt occurred.

In cases of contempt which it is not authorized to redress, the remedy of the House is resort to judicial proceedings under the criminal law.

On April 23, 1917,[26] the Supreme Court of the United States handed down a unanimous decision in the case of H. Snowden Marshall, appellant, *v.* Robert B. Gordon, Sergeant at Arms of the House of Representatives of the United States.[27]

As to the authority of the House of Commons to punish for contempt the decision says:

> Undoubtedly what went before the adoption of the Constitution may be resorted to for the purpose of throwing light on its provisions. Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly—that is, without the intervention of courts—and that such power included a variety of acts and many forms of punishment including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of Parliament into two houses either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. That this exercise of the right of legislative-judicial power to exert the authority stated prevailed in England at the time of the adoption of the Constitution and for some time after has been so often recognized as to make it too certain for anything but statement.

The opinion then differentiates between the power vested in the House of Commons and that conferred by the Constitution on the House of Representatives:

> No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own Members. Article 1, section 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can

[25] House Report No. 1077.
[26] First session Sixty-fifth Congress, Record, p. 1706.
[27] U.S. 243, p. 521.

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be conceived of. It comes, then, to this: Was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed.

The court holds, however, that, while not expressly granted, implied powers are conferred as follows:

As we have already said, the power possessed by the House of Commons was incompatible with the Constitution and could not be exerted by the House, it was yet explicitly decided that from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself; that is, to deal by way of contempt with direct obstructions to its legislative duties.

As to the nature of these implied powers:

What does this implied power embrace, is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted.

Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. And the essential nature of the power also makes clear the cogency and application of two limitations; that is, that power, even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred. Not only the adjudged cases but the congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated.

The court then cites instances of the exercise of the power by Congress and characterizes them as dealing—

with either physical obstruction of the legislative body in the discharge of its duties or physical assault upon its Members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of Members from attending so that their duties might be performed, or, finally, with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.

In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten—that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are incidental and do not change the concrete result manifested by considering the subject from the beginning. Thus we have been able to discover no single instance wherein the exertion of the power to compel testimony restraint was ever made to extend beyond the time

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when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration. And this latter statement causes us to say that where a particular act because of interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence—that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference.

As to the application of these implied powers to the case at bar, the court holds:

It remains only to consider whether the acts which were dealt with in the case in hand were of such a character as to bring them within the implied power to deal with contempt; that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed. That they were not, would seem to be demonstrated by the fact that the contentions relied upon in the elaborate arguments at bar to sustain the authority were principally rested not upon such assumption, but upon the application and controlling force of the rule governing in the House of Commons. But aside from this, coming to test the question by a consideration of the conclusion upon which the contempt proceedings were based as expressed in the report of the select committee which we have previously quoted and the action of the House of Representatives based on it, there is room only for the conclusion that the contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.

The opinion thus sums up the relation between the legislative and judicial departments of the Government:

The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in State constitutions even before the adoption of the Constitution of the United States by which they substituted for

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the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.

As to the privilege of the House in impeachment proceedings, the decision says:

It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted.

In conclusion the court recapitulates:

We repeat, out of abundance of precautions, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.

It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus and its action must be, and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

And it is so ordered.

535. The investigation of the conduct of Judge Kenesaw Mountain Landis.

A Member, rising in his place, impeached Judge Landis on his responsibility as a Member of the House.

As the Congress was nearing its close, the majority of the majority of the Judiciary Committee recommended that the further prosecution of the investigation be left to the succeeding Congress.

Conflicting views of the majority and minority of the Judiciary Committee, in 1921, as to offenses justifying impeachment.

On February 14, 1921,[28] Mr. Benjamin F. Welty, of Ohio, claiming the floor for a question of privilege, said:

I impeach said Kenesaw M. Landis for high crimes and misdemeanors and change said Kenesaw M. Landis as follows:

First. For neglecting his official duties for another gainful occupation not connected therewith.

Second. For using his office as district judge of the United States to settle disputes which might come into his court as provided by the laws of the United States.

[28] Third session Sixty-sixth Congress, Record, p. 3142.

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Third. For lobbying before the legislatures of the several States of the Union to procure the passage of State laws to prevent gambling in baseball, instead of discharging his duties as district judge of the United States.

Fourth. For accepting the position as chief arbiter of disputes in baseball associations at a salary of $42,500 per annum while attempting to discharge the duties as a district judge of the United States which tends to nullify the effect of the judgment of the Supreme Court of the District of Columbia and the baseball gambling indictments pending in the criminal courts of Cook County, Ill.

Fifth. For injuring the national sport of baseball by permitting the use of his office as district judge of the United States because the impression will prevail that gambling and other illegal acts in baseball will not be punished in the open forum as in other cases.

Mr. Speaker, I move that this charge be referred to the Committee on the Judiciary without debate for investigation and report, and on that I move the previous question.

The House, without division, agreed to the motion.

On March 2,[29] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, reported that the committee had considered the impeachment charges against Judge Landis—

which involve the legal and moral character of his alleged act in accepting employment while a district judge of the United States from certain baseball associations within the United States, to act as an arbitrator in disputes which may hereafter arise between them, at a compensation of $42,500 per annum, and that said committee find that said act of accepting the employment aforesaid, if proved, is, in their opinion, at least inconsistent with the full and adequate performance of the duty of the said the Hon. Kenesaw Mountain Landis, as a United States district judge, and that said act would constitute a serious impropriety on the part of said judge.

That said charges were filed too late in the present session of the Congress to admit of the full and complete investigation which their serious nature requires, and for that reason your committee recommend that the question of the further prosecution of said charges by full and adequate investigation be left to the Sixty-seventh Congress.

The minority views, submitted by Mr. Andrew J. Volstead, of Minnesota, fail to agree with the conclusions reached by the majority and take this position:

No violation of any law has been called to the attention of the committee, nor is it claimed that the judge is guilty of any act that would establish moral turpitude. One or both of those grounds would have to be established before impeachment proceedings could be maintained.

The investigation has gone far enough to disclose the actual facts and there is no reason for the recommendation that a further investigation be had in the next Congress. To postpone action is not only unjust to the judge, but equally unjust to the public. If the judge is guilty, this committee should say so; if he is not, he is entitled to have the public know that fact. Postponement tends only to discredit him in the eyes of the public and to weaken him in the administration of justice.

The Congress was nearing its close and consideration of the report was not reached by the House.

No action by Sixty-seventh Congress appears.

536. The investigation of charges against Attorney General Harry M. Daugherty.

Instance wherein a Member rising to a question of privilege, impeached the Attorney General on his responsibility as a Member of the House.

A Member proposing impeachment is required to present definite charges before proceeding in debate.

Charges of impeachment may not be denied presentation because of generality in statement.

[29] House Report No. 407; Record, p. 4359.

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A committee was authorized to send for persons and papers and to administer oaths in an investigation delegated to it by the House.

On September 11, 1922,[30] Mr. Oscar E. Keller, of Minnesota, rising to a question of privilege, said:

Mr. Speaker, I impeach Harry M. Daugherty, Attorney General of the United States, for high crimes and misdemeanors in office.

Mr. Keller proceeded in debate, when the Speaker interposed:

The Chair will say to the gentleman that he ought first to prefer his charges. When the gentleman rises to a question of this high privilege he ought to present definite charges at the outset.

Thereupon Mr. Keller submitted:

First. Harry M. Daugherty, Attorney General of the United States, has used his high office to violate the Constitution of the United States in the following particulars:

(1) By abridging freedom of speech.

(2) By abridging the freedom of the press.

(3) By abridging the right of people peaceably to assemble.

Second. Unmindful of the duties of his office and his oath to defend the Constitution of the United States, and unmindful of his obligations to discharge those duties faithfully and impartially, the said Harry M. Daugherty has, in his capacity of Attorney General of the United States, conducted himself in a manner arbitary, oppressive, unjust, and illegal.

Third. He has, without warrant, threatened with punishment citizens of the United States who have opposed his attempts to override the Constitution and the laws of this Nation.

Fourth. He has used the funds of his office illegally and without warrant in the prosecution of individuals and organizations for certain lawful acts which, under the law, he was specifically forbidden to prosecute.

Fifth. He has failed to prosecute individuals and organizations violating the law after those violations have become public scandal.

Mr. Thomas L. Blanton, of Texas, made the point of order that the charges recited were too general in character to constitute an impeachment of a public official.

The Speaker overruled the point of order, and Mr. Keller offered the following resolution:

Whereas impeachment of Harry M. Daugherty, Attorney General of the United States, has been made on the floor of the House of Representatives from the fourth district of Minnesota: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of Harry M. Daugherty, Attorney General of the United States, and to report to the House whether, in their opinion, the said Harry M. Daugherty has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers and to administer the customary oaths to witnesses.

On motion of Mr. Frank W. Mondell, of Wyoming, the resolution was referred to the Committee on the Judiciary.

On December 4,[31] the House, by resolution, authorized the committee in the consideration of the resolution, to send for persons and papers, administer oaths to witnesses, and sit during sessions of the House.

537. The investigation of charges against Attorney General Harry M. Daugherty, continued.

[30] Second session Sixty-seventh Congress, Record p. 12346.
[31] Fourth session Sixty-seventh Congress, Record, p. 18.

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Instance wherein a Member declined to obey a summons to appear and testify before a committee of the House.

A committee having summoned a Member to testify as to statements made by him in debate, he protested that it was an invasion of his constitutional privilege.

Form of subpoena served on a Member of the House.

A committee asserted the power of the House to arrest and imprison recalcitrant Members in order to compel obedience to its summons.

An official against whom charges of impeachment were pending asked leave and was allowed to file an answer.

In compliance with a request from the committee that he furnish it with a statement of the facts relied on by him as constituting the offenses charged, Mr. Keller filed a statement specifying some 60 different charges. Thereupon Attorney General Daugherty asked leave and was allowed to file an answer.

While these pleadings were under consideration by the Committee on the Judiciary Mr. Keller appeared before the committee and read a prepared statement criticizing the methods of the committee in conducting the inquiry and announcing:

I reiterate now that I am in possession of evidence ample to prove Harry M. Daugherty guilty of all of the high crimes and misdemeanors with which I have charged him. I am ready and anxious to present this evidence in a proper way before an unbiased committee, but I emphatically refuse to permit it to be used as whitewashing material.

I now repeat my demand that my resolution, House Resolution 425, be reported to the House of Representatives with the recommendation that it pass, and that I be permitted to present my evidence before an unbiased committee in the proper way. With these whitewashing proceedings I shall have nothing further to do.

He then withdrew and declined to further participate in the proceedings.

By direction of the committee the following subpoena was issued and was served upon Mr. Keller by the Sergeant at Arms of the House December 14:

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA.

To the SERGEANT AT ARMS or his special messenger:

You are hereby commanded to summon Hon. Oscar E. Keller to be and appear before the Judiciary Committee of the House of Representatives of the United States, of which the Hon. Andrew J. Volstead is chairman, in their chamber in the city of Washington on December 15, 1922, at the hour of 10:30 a.m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States at the city of Washington, this 14th day of December, 1922.

[SEAL.] F. H. GILLETT, *Speaker.*

Attest:

WM. TYLER PAGE, *Clerk.*

Mr. Keller refused to heed the summons and by his attorney, who appeared before the committee for him, submitted that as a Representative in Congress he was not legally bound to obey the subpœna.

On January 25, 1923,[31A] Mr. Andrew J. Volstead, of Minnesota, from the Committee on the Judiciary, submitted a report reciting:

[31A] Fourth session Sixty-seventh Congress, House Report No. 1371.

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That the said Oscar E. Keller was duly summoned as a witness by authority of the House of Representatives to give testimony before this committee touching matters of inquiry committed to that committee, and that he willfully made default in that in disobedience to said subpœna and without valid cause or excuse, but in contempt of the authority of the House of Representatives, he willfully failed and refused to appear as such witness and willfully failed and refused to testify in obedience to said subpœna. Your committee is of the opinion that Mr. Keller was legally required to obey said subpœna and that the excuse he submitted through his said attorney is without any merit; that the House of Representatives possesses the power to cause him to be arrested and confined in prison until he shall consent to testify, such confinement not to extend beyond the term of this Congress, and power to otherwise deal with him so as to compel obedience to the summons.

Subsequent illness of Mr. Keller rendered inadvisable further action on the part of the committee or the House.

538. The investigation of the charges against Attorney General Harry M. Daugherty, continued.

A motion to lay on the table a resolution providing for final disposition of impeachment proceedings does not, if agreed to, carry such proceedings to the table with the resolution.

Minority views submitted by Mr. R. Y. Thomas, jr., of Kentucky, take the position that House Resolution 425 merely authorized an investigation of the charges and not a trial of the Attorney General, and conclude with the recommendation:

I therefore recommend, in view of what I consider the farcical investigation of this case, that a special committee be appointed by the Speaker of the House with instructions to make a full and fair investigation of all the charges against the Attorney General.

On January 25, 1923,[32] Mr. Volstead called up the majority report and offered the following resolution:

That whereas the Committee on the Judiciary has made an examination touching the charges sought to be investigated under House resolution 425 to ascertain if there is any probable ground to believe that any of the charges are true; and on consideration of the charges and the evidence obtained it does not appear that there is any ground to believe that Harry M. Daugherty, Attorney General of the United States, has been guilty of any high crime or misdemeanor requiring the interposition of the impeachment powers of the House:

Resolved, That the Committee on the Judiciary be discharged from further consideration of the charges and proposed impeachment of Harry M. Daugherty, Attorney General, and that House Resolution 425 be laid upon the table.

After extended debate, Mr. Finis J. Garrett, of Tennessee, moved to lay the resolution on the table.

In response to a parliamentary inquiry as to whether an affirmative vote on the motion would carry the entire impeachment proceedings to the table, the Speaker held:

This is a resolution laying the whole subject on the table. A motion to lay that on the table, if it carried, would be equivalent to rejecting it. A motion to lay the impeachment proceedings on the table would still leave the impeachment matter pending.

On the question of agreeing to the motion to lay the resolution on the table there were 88 yeas and 204 nays, and the motion was rejected.

A division of the question on the pending resolution and preamble having been demanded, the resolution was agreed to without division, and the preamble by a vote of yeas 206, nays 78.

[32] Fourth session Sixty-seventh Congress, Journal, p. 148; Record, p. 2410.

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539. Instance wherein the Senate transmitted to the House testimony adduced before one of its committees for consideration by the House with a view to impeachment.

An official against whom charges were pending having resigned his office, the House committee to which they had been referred made no report.

On March 25, 1924,[33] the Senate passed and messaged to the House the following resolution:

Whereas one Clarence C. Chase is and, for more than a year last past, has been a civil officer of the United States, to wit, the collector of customs at the port of El Paso, Tex.; and

Whereas in the prosecution of an inquiry by the Committee on Public Lands and Surveys of the Senate under Senate Resolution 147, it became necessary to inquire into the source from which one A. B. Fall, late Secretary of the Interior, secured large sums of money at or about the time or shortly after he entered upon negotiations resulting in the execution of leases or contracts relating to the naval oil reserves; and

Whereas it appears from the testimony taken and proceedings had before the said committee that the said Clarence C. Chase entered into a conspiracy with the said A. B. Fall to mislead and deceive the said committee concerning the source of such moneys, and that pursuant to such conspiracy the said Clarence C. Chase, on or about the 29th of November, 1923, endeavored to induce one Price McKinney to represent to and testify before the said committee that he had loaned to the said Fall at or about the time hereinbefore mentioned the sum of $100,000; and

Whereas the said Clarence C. Chase well knew that the said Price McKinney had made no such loan to the said Fall; and

Whereas the said Clarence C. Chase being, on the 24th day of March, 1924, called before the said committee and interrogated concerning the matters herein referred to by the said committee, declined and refused to answer any questions in relation to the same upon the ground that his answers might tend to incriminate him: Now, therefore, be it

Resolved, That a copy of the testimony adduced and the proceedings had before the said Committee on Public Lands and Surveys under Senate Resolution 147 be, with a copy of this resolution, transmitted to the House of Representatives for such proceeding against the said Clarence C. Chase as may be appropriate.

On the following day[34] the resignation of Clarence C. Chase was announced in the Senate.

In the House the resolution was referred from the Speaker's table to the Committee on the Judiciary, which made no report thereon.

540. Proposed inquiry into the eligibility of Andrew W. Mellon to serve as Secretary of the Treasury, in 1932.

Secretary Mellon having been nominated and confirmed as ambassador to a foreign country and having resigned as Secretary of the Treasury, the House declined to authorize an investigation.

On January 6, 1932,[35] Mr. Wright Patman, of Texas, rising in his place in the House, charged that Andrew William Mellon, of Pennsylvania, was serving as Secretary of the Treausry of the United States in contravention of statutes[36] prohibiting certain officials from owning certain classes of property and engaging in certain business enterprises, and offered a privileged resolution providing for an investigation.

On February 13,[37] Mr. Hatton W. Sumners, of Texas, from the

[33] First session Sixty-eighth Congress, Record, p. 4915.
[34] Record p. 5009.
[35] First session, Seventh-second Congress, Record, p. 1400.
[36] U.S. Code, title 5, sec. 243; title 14, sections 1, 51, 66; title 19, sections 3, 382, etc.
[37] Record p. 3850.

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Committee on the Judiciary to which the resolution had been referred, presented a report [38] recommending the adoption of the following:

Whereas Hon. Wright Patman, Member of the House of Representatives, filed certain impeachement charges against Hon. Andrew W. Mellon, Secretary of the Treasury, which were referred to this committee; and

Whereas pending the investigation of said charges by said committee, and before said investigation had been completed, the said Hon. Andrew W. Mellon was nominated by the President of the United States for the post of ambassador to the Court of St. James and the said nomination was duly confirmed by the United States Senate pursuant to law, and the said Andrew W. Mellon has resigned the position of Secretary of the Treasury: Be it

Resolved by this committee, That the further consideration of the said charges made against the said Andrew W. Mellon, as Secretary of the Treasury, be, and the same are hereby discontinued.

The resolution submitted by committee was agreed to without debate or division.

541. A proposal to investigate the official conduct of the President of the United States with a view to impeachment was laid on the table.

The question of consideration may not be demanded on a resolution of impeachment until the reading of the resolution has been concluded.

Recognition to propound a parliamentary inquiry is within the discretion of the Chair and may interrupt proceedings of high privilege.

The laying on the table of a resolution of impeachment does not preclude the offering of a similar resolution if not in identical language.

Motions for the disposition of a resolution of impeachment are not in order until it has been read in full.

A resolution of impeachment may be expunged from the record by unanimous consent only.

On December 13, 1932,[39] Mr. Luis T. McFadden, of Pennsylvania, rising to a question of constitutional privilege in the House, proposed to impeach the President of the United States for "high crimes and misdemeanors" in that he had "unlawfully attempted to usurp legislative powers" and otherwise in domestic and foreign relations "violated the Constitution and laws of the United States." The charges were of a general nature and prefaced a resolution authorizing the Committee on the Judiciary to conduct an investigation with a view to impeachment.

In the course of the reading of the resolution by the Clerk, Mr. William H. Stafford, of Wisconsin, interrupted and proposed to submit a parliamentary inquiry, when Mr. Thomas L. Blanton, of Texas, presented the point of order that a proceeding of this character could not be interrupted by a parliamentary inquiry.

The Speaker [40] overruled the point of order and said:

That is in the discretion of the Chair. The Chair will recognize the gentleman from Wisconsin to make a parliamentary inquiry.

Mr. Stafford inquired if it would be in order to raise the question of consideration. The Speaker, Mr. John N. Garner, replied that the question of consideration could not be raised until the reading of the resolution had been completed.

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[38] House Report No. 444.
[39] Second session, Seventy-second Congress, Record, p. 399.
[40] John N. Garner, of Texas, Speaker.

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The reading of the resolution having been concluded, Mr. Edward W. Pou, of North Carolina, moved that the resolution be laid on the table.

On a yea and nay vote, ordered on the demand of Mr. Leonidas C. Dyer, of Missouri, the yeas were 361, the nays were 8, and the resolution was laid on the table.

On January 17, 1933,[41] Mr. McFadden again rose to a question of privilege and submitted a similar but not identical, resolution embodying similar charges and carrying a similar proposal for an investigation by the Committee of the Judiciary, and asked recognition to debate it. The Speaker said:

The gentleman is entitled to an hour, but first the Clerk must report the resolution of impeachment.

During the reading of the resolution by the Clerk, Mr. Robert Luce, of Massachusetts, interrupted and submitted a parliamentary inquiry asking if it were in order to bring up at this time a proposition of similiar import to one previously laid on the table.

The Speaker said:

The Chair, of course, has not heard the resolution read. Probably if it was identical with the resolution submitted some time ago and laid on the table there would be some question whether or not a second impeachement could be had. But the President can be impeached, or any person provided for by the Constitution, a second time, and the Chair thinks the better policy would be to have the resolution read and determine whether or not it is the same.

Mr. Fred A. Britten, of Illinois, inquired if it would be in order at this time to offer a motion for disposition of the resolution.

The Speaker replied:

No. The Chair would not recognize any Member to make a motion until the resolution is read.

Mr. Britten further inquired if a motion to expunge the resolution would be entertained.

The Speaker responded:

It may only be done by unanimous consent.

The Clerk having concluded the reading of the resolution, Mr. Henry T. Rainey,[42] of Illinois, offered a motion to lay the resolution on the table.

Mr. McFadden submitted that he was entitled to recognition for one hour.

The Speaker differentiated:

The gentleman from Illinois moves to lay the resolution of impeachment on the table.

May the Chair be permitted to make a statement with reference to the rules applying to that motion. The parliamentarian has examined the precedents with reference to the motion. Speaker Clark and Speaker Gillette, under identical conditions, held that a motion to lay on the table deprived a Member of the floor, although the general rules granted him one hour in which to discuss the resolution of impeachment or privileges of the House. Therefore the motion is in order.

The question being put, and the yeas and nays being ordered, it was decided in the affirmative, yeas, 344, nays, 11, and the resolution was laid on the table.

542. The inquiry into the conduct of Harry B. Anderson, United States judge for the western district of Tennessee, in 1931.

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[41] Second session Seventy-second Congress, Record, p. 1954.

[42] Mr. McFadden and the President were members of the same party; Mr. Pou and Mr. Rainey were members of the opposing party.

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The inquiry into the conduct of Judge Anderson was initiated by a resolution supplemented by a report from the Department of Justice.

While the House decided against impeachment it expressed disapproval of practices disclosed by the investigation.

On March 24, 1930,[43] Mr. Fiorello LaGuardia, of New York, introduced a resolution authorizing a special committee of five members of the Committee on the Judiciary to inquire into the official conduct of Harry B. Anderson, United States judge for the western district of Tennessee.

The resolution was referred to the Committee on the Judiciary and reported to the House by direction of that committee through Mr. Andrew J. Hickey, of Indiana, on June 13.[44]

After brief debate, the resolution was agreed to with an amendment providing for the designation of the members of the special committee by the chairman of the Committee on the Judiciary.

In the course of his remarks, Mr. Hickey, in response to an inquiry from Mr. William H. Stafford, of Wisconsin, explained that the preliminary inquiry had been delegated by the committee to a subcommittee which in addition to its own research had the advantage of a report by the Department of Justice which had made an extensive investigation of the handling of bankruptcy proceedings in Judge Anderson's court.

Pursuant to the resolution, Mr. Hickey, Mr. LaGuardia, Mr. Charles I. Sparks, of Kansas, Mr. Hatton W. Sumners, of Texas, and Mr. Gordon Browning, of Tennessee, were appointed to the special committee which after investigation recommended to the committee that no further action be taken.

On February 18, 1931,[45] Mr. George S. Graham of Pennsylvania, presented the report of the Committee on the Judiciary, embodying the recommendation of the subcommittee

The report recited that while there were no grounds for invoking the high power of impeachment, the investigation disclosed—

> certain matters which the committee does not desire to be regarded as in any way approving or sanctioning. The practice existing in the western district of Tennessee, both under Judge Anderson and his predecessors, of appointing referees to the place and position of receivers in bankruptcy matters is one which the committee thinks ought to be discontinued and desires to express its disapproval of the practice. The atmosphere and surroundings in the Tully case while free from evidence of wrong on the part of the judge, lead the committee to say that in their opinion when private matters or family matters come in touch with the court a judge should exercise more than ordinary care to avoid the appearance of improperly using the process of the court in any way that might be misunderstood, for in such matters the conduct of a judge must always be above suspicion.

The report then recommended the adoption of the following resolution which was agreed to by the House without debate:[46]

> *Resolved*, That the evidence submitted on the charges against Hon. Harry B. Anderson, district judge for the western district of Tennessee, does not warrant the interposition of the constitutional powers of impeachment of the House.

543. The investigation into the conduct of William E. Baker, United States district judge for the northern district of West Virginia.

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[43] Second session Seventy-first Congress, Record, p. 6051.
[44] Record, p. 10649.
[45] Third session Seventy-first Congress, Record, p. 5312.
[46] Record, p. 5009.

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A memorial addressed to the Speaker and setting forth charges against a civil officer was referred to the Committee on the Judiciary, which recommended an investigation.

The House referred the case of Judge Baker to the Committee on the Judiciary instead of to a select committee for investigation.

On May 22, 1934,[47] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary, reported the following resolution, which was agreed to:

Whereas certain charges[48] against William E. Baker, United States district judge for the Northern District of West Virginia, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Be it

Resolved, That the Committee on the Judiciary be, and they hereby are, authorized and directed to inquire into the official conduct of William E. Baker, United States district judge for the Northern District of West Virginia, and to report to the House whether in their opinion the said William E. Baker has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring interposition of the constitutional powers of this House; and that the said committee have power to send for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until adjournment and thereafter until said inquiry is completed and report to the next session of the House.

The committee thus constituted was by later resolution authorized to employ clerical assistance and to incur expenses not to exceed $2,500.

On February 10, 1925,[49] Mr. Leonidas C. Dyer, of Missouri, from the Committee on the Judiciary, submitted the report of the committee on the case.

The committee found:

That in their opinion the said William E. Baker has not been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of this House, and recommends that articles of impeachment be not directed by the House against the said William E. Baker.

The report was referred to the Committee of the Whole House.

544. The inquiry into the conduct of Judge George W. English, United States judge for the eastern judicial district of Illinois.

A resolution proposing investigation with a view to impeachment was introduced by delivery to the Clerk and was referred to the Committee on Rules, on request of which committee it was re-referred to the Committee on the Judiciary.

A joint resolution created a select committee (in effect a commission), composed of Members of the House, and authorized it to report to the succeeding Congress.

A select committee visited various States and took testimony.

January 13, 1925,[50] Mr. Harry B. Hawes, of Missouri, introduced, by delivery to the Clerk, a resolution for an investigation of the official conduct of George W. English, district judge for the eastern district of Illinois, which, under the rule, was referred to the Committee on Rules. On February 3,[51] Mr. Bertrand H. Snell, from the Committee on Rules, by direction of that committee, asked unanimous consent that the resolution be referred to the Committee on the Judiciary, to which communications relating to the charges have been previously referred. The request was agreed to, and subsequently[52] Mr. George S. Graham,

[47] First session Sixty-eighth Congress, Record, p. 9240.
[48] The memorial submitting the charges appears in full at p. 4875 of the Record.
[49] House Report No. 1443.
[50] Second session Sixty-eighth Congress, Record, p. 1790.
[51] Record, p. 2940.
[52] Second session Sixty-eighth Congress, Record, p. 3472.

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of Pennsylvania, introduced a joint resolution which was reported from the Committee on the Judiciary and agreed to February 12,[53] as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That William D. Boies, Charles A. Christopherson, Ira G. Hersey, Earl C. Michener, Hatton W. Sumners, John N. Tillman, and Royal H. Weller, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they hereby are, authorized and directed to inquire into the official conduct of George W. English, United States district judge for the eastern district of Illinois, and so report to the House whether in their opinion the said George W. English has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, District of Columbia, and elsewhere and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal, and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment sine die of the Sixty-eighth Congress, and thereafter until said inquiry is completed, and report to the Sixty-ninth Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic and clerical assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside of the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee; *Provided, however,* That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

The joint resolution was passed by the Senate and approved by the President. Under the authorization thus conferred, the committee held hearings in Illinois, Missouri, and the District of Columbia following the adjournment of the Sixty-eighth Congress and submitted a report to the Sixty-ninth Congress.[54]

545. Impeachable offenses are not confined to acts interdicted by the constitution or the Federal Statutes but include also acts not commonly defined as criminal or subject to indictment.

Impeachment may be based on offenses of a political character, on gross betrayal of public interests, inexcusable neglect of duty, tyrannical abuse of power, and offenses of conduct tending to bring the office into disrepute.

No judge is subject to impeachment on the complaint that he has rendered an erroneous decision.

A committee finding that a judge had failed to live up to the standards of the judiciary in matters of personal integrity and in the discharge of the duties of his office, recommended articles of impeachment.

It is in order to demand a division of the question on agreeing to a resolution of impeachment and a separate vote may be had on each article.

On March 25, 1926,[55] Mr. George S. Graham, of Pennsylvania, from the Committee on the Judiciary submitted the report of the committee reviewing the several charges in detail.

In determining whether the nature of the offenses charged warranted indictment, the committee decide:

[53] Journal, p. 237.
[54] First session Sixty-ninth Congress, House Report No. 145.
[55] First session Sixty-ninth Congress, House Report No. 653.

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Although frequently debated, and the negative advocated by some high authorities, it is now, we believe, considered that impeachment is not confined alone to acts which are forbidden by the Constitution or Federal statutes. The better sustained and modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law but also acts which are not defined as criminal and made subject to indictment, but also to those which affect the public welfare. Thus an official may be impeached for offenses of a political character and for gross betrayal of public interests. Also, for abuses or betrayal of trusts, for inexcusable negligence of duty, for the tyrannical abuse of power, or, as one writer puts it, for a "breach of official duty by malfeasance or misfeasance, including conduct such as drunkenness when habitual, or in the performance of official duties, gross indecency, profanity, obscenity, or other language used in the discharge of an official function, which tends to bring the office into disrepute, or for an abuse or reckless exercise of discretionary power as well as the breach of an official duty imposed by statute or common law."

The committee hold, however, that:

No judge may be impeached for a wrong decision.

In support of the contention that the personal conduct of an official may be made the basis of impeachment the report says:

A Federal judge is entitled to hold office under the Constitution during good behavior, and this provision should be considered along with article 4, section 2, providing that all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Good behavior is the essential condition on which the tenure to judicial office rests, and any act committed or omitted by the incumbent in violation of this condition necessarily works a forfeiture of the office.

A civil officer may have behaved in public so as to bring disgrace upon himself and shame upon the country and he would continue to do this until his name became a public stench and yet might not be subject to indictment under any law of the United States, but he certainly could be impeached. Otherwise the public would in this and kindred cases be beyond the protection intended by the Constitution. When the Constitution says a judge shall hold office during good behavior it means that he shall not hold it when his behavior ceases to be good behavior.

The report therefore concludes:

The Federal judiciary has been marked by the services of men of high character and integrity, men of independence and incorruptibility, men who have not used their office for the promotion of their private interests or those of their friends. No one reading the record in this case can conclude that this man has lived up to the standards of our judiciary, nor is he the personification of integrity, high honor, and uprightness, as the evidence presents the picture of the manner in which he discharged the high duties and exercised the powers of his great office.

The committee accordingly submit five articles of impeachment with the recommendation that they be adopted by the House and presented to the Senate with a demand for conviction and removal from office.

Minority views [56] are filed taking issue with facts determined and conclusions reached in the several specific charges discussed in the majority report, but indicating no disagreement with the views of the majority as to the law governing impeachment proceedings as set forth in the report.

The report was debated in the House on March 30, 31, and April 1, when the resolution reported by the committee was agreed to—yeas, 306; nays, 62.

[56] Record, p. 6363.

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The House then adopted a resolution [57] submitted by Mr. Graham naming Messrs. Earl C. Michener, Ira G. Hersey, W. D. Boies, C. Ellis Moore, George R. Stobbs, Hatton W. Sumners, and Andrew J. Montague, majority and minority members of the Committee on the Judiciary, as managers to conduct the impeachment, and instructing them to appear at the bar of the Senate and demand conviction.

On reception of the report in the House on March 25, Mr. Charles R. Crisp, of Georgia, rising to a parliamentary inquiry, asked if it would be in order to demand a separate vote on each of the five articles of impeachment.

The Speaker replied in the affirmative, and when the vote was taken on April 1,[58] recognized Mr. William B. Bowling, of Alabama, to demand a separate vote on the first article of the impeachment, and said:

In response to the query of the gentleman may the Chair state that in view of the fact he is about to recognize the gentleman from Alabama to demand a separate vote on article of impeachment No. 1, the Chair will now put the question on agreeing to the resolution with all the articles except article 1.

In the opinion of the Chair the proper procedure under the circumstances, a separate vote having been demanded on only one article, would be that the vote should be first taken on the resolution and all other articles.

546. The managers on the part of the House having formally presented articles of impeachment, the Senate organized for the trial.

A Senator excused himself from participation in impeachment proceedings on the ground of close personal relations with one of the managers for the House, but on suggestion took the oath as a member of the court of impeachment.

A committee of the Senate after investigation expressed the opinion that during a trial of impeachment the House could, with the consent of the Senate, adjourn and the Senate proceed with the trial.

By common consent it was agreed that a judge under trial before the Senate continued undisturbed in the exercise of the judicial duties of his office.

On April 6,[59] the House by resolution notified the Senate of the appointment of managers and a message was communicated from the Senate in response informing the House that the Senate was ready to receive them.

Accordingly, on April 22,[60] at 2 o'clock p.m., the managers of the impeachment on the part of the House appeared before the bar of the Senate and were announced by the doorkeeper. The Vice President received them and they were seated by the Sergeant at Arms.

By direction of the Vice President the Sergeant at Arms made proclamation:

Hear ye! Hear ye! Hear ye! All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against Hon. George W. English, judge of the United States Court for the Eastern District of Illinois.

Thereupon Mr. Manager Michener read the resolution appointing the managers on the part of the House and presented the articles of

[57] Record, p. 6736.
[58] Record, p. 6735.
[59] Record, p. 6963.
[60] Record, p. 7962.

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impeachment with the demand of the House for impeachment, conviction, and removal from office.

On motion of Mr. Albert B. Cummins, of Iowa, the Senate agreed to an order fixing Friday, April 23, as the date on which the Senate would organize for the trial, and the managers on the part of the House retired from the Chamber.

Mr. Coleman L. Blease, of South Carolina, thereupon excused himself from participation in the trial on account of his former business relations with Mr. Manager Dominick.

When, however, on the day of trial, Mr. Blease's name was called for him to be sworn and he failed to appear to take the oath, Mr. John S. Williams, of Mississippi, submitted:

> Mr. President, I noticed that, when the name of the Senator from South Carolina was called, he shook his head to indicate that he would not take the oath. On yesterday the Senator from South Carolina asked to be excused from participating in the trial of Judge English and gave as his reason for so doing the relationship which exists between himself and one of the board of managers of the House, Representative Dominick. We all sympathize with the views expressed by the Senator from South Carolina; but in the composition of the Senate as a court to try Judge English on the indictment which has been returned here by the House of Representatives, I think no one may be excused from taking the oath.
>
> What shall happen to the Senator from South Carolina when it becomes necessary to vote is an entirely different matter, but the rule specifically provides that all the Members of the Senate who are present shall present themselves and take the oath, and that absent Senators shall take the oath as they appear in the Senate. I therefore think it not competent for us to excuse the Senator from South Carolina from taking the oath as a member of the court. I hope the question will not be raised and that we shall avoid any technicality which might be urged at any time. I ask the Senator from South Carolina to take the oath.

Thereupon Mr. Blease, when his name was called the second time, came forward and took the oath.

The designated day [61] having arrived, the senior Senator from Iowa, Mr. Cummins, by request administered the oath as the Presiding Officer of the court to the Vice President, who in turn swore in the Senators in groups of 10.

Mr. James A. Reed, of Missouri, having raised a question as to the administration of the oath of absent Senators, the Vice President said:

> Under the precedents of the Senate each Senator who has not been sworn will be called to the desk when he enters the Chamber and the oath will be administered to him.

The Senate then agreed to an order submitted by Mr. Cummins notifying the House of Representatives that the Senate was ready for the trial of the articles of impeachment.

Pending the appearance of the House managers, Mr. Claude A. Swanson, of Virginia, inquired of Mr. Cummins, the Chairman of the Judiciary Committee, if conclusion has been reached as to whether the trial required that both Houses of Congress remain in session during the trial or whether the House of Representatives with consent of the Senate could adjourn sine die while the latter remained in session for the trial of the case of whether both Houses might adjourn and the Senate convene in extra session for the trial.

Mr. Cummins said:

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[61] Record, p. 8026.

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Certain members of the Judiciary Committee, of which I happen to be chairman, have made rather an exhaustive study of that subject. I think it is the opinion of all the members of the Judiciary Committee who have examined the matter that the House can adjourn sine die, with the consent, of course, of the Senate, and that the impeachment proceedings can go forward without the presence of the House of Representatives; although I say, very frankly, that the only precedent with regard to that question was decided the other way. That precedent was in the impeachment of Secretary Belknap. It was then ruled by the Senate that the House of Representatives must be present during the impeachment trial. A very close vote. I think the vote was 19 to 17, but there were not more than 2 votes either way.

In the Belknap case the question arose whether it was necessary for the House to be in session during the trial of the impeachment, and it was ruled in that case that the House must remain in session. I think everybody recognizes that there were very peculiar circumstances surrounding the trial of the impeachment of Secretary Belknap. There were political considerations, which I have no doubt had great weight in the determination of the matter. It was alleged that certain of the Senators did not want to try the Belknap case until after November elections. That did not appear, of course, in the ruling; but, at any rate, that was one of the material things that developed in that case. There was a controversy in respect to the time at which the case should be tried. Some wanted to put it over until after the elections and some wanted to try it before the elections. There are, I think, 12 precedents in the various States with constitutions substantially like our own.

There are half a dozen or more precedents in the States in which it has been uniformly held that the Senate could go forward in the trial of an impeachment case without the presence of the House.

Without any order on the part of the Senate, I appointed a committee—a subcommittee it may be called—of the Judiciary Committee to study and consider that subject.

And the majority of the committee, so far as I know, without any dissent, although they were not all present when the final conclusion was reached, held that it was not necessary for the House to be present or in session during the trial of the impeachment.

Mr. Joseph E. Ransdell, of Louisiana, further inquired if there was any question as to the right of a judge on trial to continue in the exercise of the judicial duties of his office.

Mr. Cummins replied:

None whatever. He will continue to discharge his duties as judge until after the trial of the impeachment.

The managers on the part of the House having appeared, an order was made that a summons be issued for George W. English returnable on May 3, and the Senate sitting for the trial of the impeachment adjourned until that date.

547. The answer of the respondent was printed and time allowed for replication of managers, with order that further pleadings be filed with the Secretary with due notice to the other party prior to a designated date.

The resignation of the respondent in no way affects the right of the court of impeachment to continue the trial and hear and determine all charges.

The respondent having retired from office, the managers, while maintaining their right to prosecute the charges to a final verdict, recommended that impeachment proceedings be discontinued.

On May 3,[62] the Senate convened as a court of impeachment and the respondent appeared and was seated with counsel in the area in front of the Secretary's desk. The return of the Sergeant at Arms was read and sworn to and the respondent presented his answer which

[62] Record, p. 8578.

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was read by the Secretary. The answer was ordered printed and the managers on the part of the House were by order of the Senate given until May 5 in which to present a replication, with direction that further pleadings be filed with the Secretary of the Senate with notice to the other party and that all pleadings be closed not later than May 10. The Senate sitting as a court of impeachment then adjourned until May 5.

In the House on May 4,[63] Mr. Carl C. Michener, of Michigan, presented for the managers on the part of the House, their replication which was approved by the House and by resolution ordered to be messaged to the Senate.

On the following day,[64] the Vice President laid before the court of impeachment the message received from the House transmitting the replication which was read by the Secretary and was ordered to be printed. The court of impeachment adopted the usual order relating to the procedure of the Senate sitting as a court of impeachment, and a further order setting the trial for November 10, 1926.

On November 10,[65] the court of impeachment having convened and the managers on the part of the House and counsel for the respondent having been received, Mr. Manager Michener announced:

Mr. President, I am directed by the managers on the part of the House of Representatives to advise the Senate, sitting as a court of impeachment, that in consideration of the resignation of George W. English, district judge of the United States for the eastern district of Illinois, and its acceptance by the President of the United States, certified copies of which I hereby submit, the managers on the part of the House have determined to recommend the dismissal of the pending impeachment proceedings. The managers desire to report their action to the House, and to this end they respectfully request the Senate, sitting as a court of impeachment, to adjourn to such time as may be necessary to permit the House to take appropriate action upon their report.

The resignation and its acceptance are as follows:

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ILLINOIS.
CHAMBERS OF JUDGE GEORGE W. ENGLISH, EAST ST. LOUIS.
East St. Louis, Ill., November 4, 1926.

To His Excellency the PRESIDENT OF THE UNITED STATES:

I hereby tender my resignation as judge of the District Court of the United States for the Eastern District of Illinois, to take effect at once.

In tendering this resignation I think it is due you and the public that I state my reasons for this action.

While I am conscious of the fact that I have discharged my duties as district judge to the best of my ability, and while I am satisfied that I have the confidence of the law-abiding people of the district, yet I have come to the conclusion on account of the impeachment proceedings instituted against me, regardless of the final result thereof, that my usefulness as a judge has been seriously impaired.

I therefore feel that it is my patriotic duty to resign and let someone who is in no wise hampered be appointed to discharge the duties of the office.

Your obedient servant,

GEORGE W. ENGLISH.

[63] Record, p. 8686.
[64] Record, p. 8725.
[65] First session Sixty-ninth Congress, Record, p. 3.

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THE WHITE HOUSE,
Washington, November 4, 1926.

Hon. GEORGE W. ENGLISH,
United States District Court, East St. Louis, Ill.

SIR: Your resignation as judge of the District Court of the United States for the Eastern District of Illinois dated November 4, 1926, has been received and is hereby accepted to take effect at once.

Very truly yours,

CALVIN COOLIDGE.

On motion of Mr. Charles Curtis, of Kansas, it was:

Ordered, That the Sergeant at Arms be directed to notify all witnesses heretofore subpoenaed that they will not be required to appear at the bar of the Senate until so notified by him.

It was further ordered:

That in view of the statement just made by the chairman of the managers on the part of the House of Representatives, the Senate, sitting for the trial of the impeachment of Judge George W. English, adjourn until Monday, the 13th day of December, 1926, at 1 o'clock p.m.

The managers on the part of the House and counsel for the respondent then retired from the Chamber.

In the House on December 11,[66] Mr. Michener, by direction of the managers on the part of the House, submitted their unanimous report, reciting the resignation of George W. English, and holding:

The managers are of the opinion that the resignation of Judge English in no way affects the right of the Senate, sitting as a court of impeachment, to hear and determine said impeachment charges.

The managers, however, recommended:

Inasmuch, however, as the respondent, George W. English, is no longer a civil officer of the United States, having ceased to be a judge of the District Court of the United States for the Eastern District of Illinois, the managers on the part of the House of Representatives respectfully recommend that the impeachment proceedings pending in the Senate against said George W. English be discontinued.

Mr. Michener, then moved the following resolution:

Resolved, That the managers on the part of the House of Representatives in the impeachment proceedings now pending in the Senate against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be instructed to appear before the Senate, sitting as a court of impeachment in said cause, and advise the Senate that in consideration of the fact that said George W. English is no longer a civil officer of the United States, having ceased to be a district judge of the United States for the eastern district of Illinois, the House of Representatives does not desire further to urge the articles of impeachment heretofore filed in the Senate against said George W. English.

After debate, the yeas and nays being demanded and ordered, the resolution was agreed to, yeas 290, nays 23.

The resolution of the House was messaged to the Senate and was considered by the Senate sitting as a court of impeachment on December 13,[67] when after debate the following order was agreed to, yeas 70, nays 9.

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[66] Record, p. 297.
[67] Record, p. 344.

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Ordered, That the impeachment proceedings against George W. English, late judge of the District Court of the United States for the Eastern District of Illinois, be and the same are, duly dismissed.

The Secretary having been directed to communicate the order to the House of Representatives, the Senate sitting as a court of impeachment adjourned sine die.

548. The investigation into the conduct of Frederick A. Fenning, a commissioner of the District of Columbia, in 1926.

A Member by virtue of his office submitted articles of impeachment and offered a resolution referring them to a committee of the House.

A committee of the House by majority report held a commissioner of the District of Columbia not to be a civil officer subject to impeachment under the Constitution.

A committee having reported that evidence adduced, while not supporting impeachment, disclosed grave irregularities, the respondent resigned.

On April 19, 1926,[68] Mr. Thomas L. Blanton, of Texas, claiming the floor for a question of privilege, announced that by virtue of his office as a Member of the House he impeached Frederick A. Fenning, Commissioner of the District of Columbia, of high crimes and misdemeanors, and submitted written charges. At the conclusion of the reading of the charges, Mr. Blanton proposed the following resolution which was referred to the Committee on the Judiciary.

Resolved, That the Committee on the Judiciary be, and it is hereby, directed to inquire and report whether the action of this House is necessary concerning the alleged official misconduct of Frederick A. Fenning, a commissioner of the District of Columbia, and said Committee on the Judiciary is in all things hereby fully authorized and empowered to investigate all acts of misconduct and report to the House whether in their opinion the said Frederck A. Fenning has been guilty of any acts which in the contemplation of the Constitution, the statute laws, and the precedents of Congress are high crimes and misdemeanors requiring the interposition of the constitutional powers of this House, and for which he should be impeached.

That this committee is hereby authorized and empowered to send for persons and papers, to administer oaths, to employ, if necessary, an additional clerk, and to appoint and send a subcommittee whenever and wherever necessary to take necessary testimony for the use of said committee or subcommittee, which shall have the same power in respect to obtaining testimony as exercised and is hereby given to said Committee on the Judiciary.

That the expenses incurred by this investigation shall be paid out of the contingent fund of the House upon the vouchers of the chairman of said committee, approved by the Clerk of this House.

Mr. George S. Graham, of Pennsylvania, from that committee reported the resolution back to the House on May 4,[69] with amendments as to phraseology and on May 6,[70] it was agreed to as amended.

The report [71] of the committee, presented on July 2, considers first the power and right of the House to impeach and thus analyzes the requisites essential to impeachment:

Two things are necessary before the House will authorize impeachment: First, there must be an officer who, by reason of holding such office, is impeachable under the Constitution and laws of the United States, and, second, the establishment by creditable evidence of such misconduct on the part of such officer, defined as

[68] First session Sixty-ninth Congress, Record, p. 7753.
[69] Record, p. 8718.
[70] Record, p. 8828.
[71] House Report No. 1590.

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"treason, bribery, or other high crimes and misdemeanors" as will bring the office into disrepute, and which will require his removal, to maintain its purity and the respect of the people for the office.

The question as to whether a Commissioner of the District of Columbia is a Federal officer and subject to the interposition of the Constitutional powers of the House in this respect, is answered in the negative as follows:

The first question that confronts us is, Is a Commissioner of the District of Columbia, appointed by the President and confirmed by the Senate, a civil officer of the United States, subject to the foregoing provision of the Federal Constitution? In order to arrive at a correct solution of this question it is necessary to review the acts of Congress relating to the District of Columbia.

The area within the District of Columbia was ceded by Maryland to, and accepted by, the Government in accordance with clause 17 of Article I of the Constitution, which granted to Congress exclusive legislative jurisdiction over such District. This in effect makes Congress the legislative body for the District with the same power as legislative bodies of the various States, and it has full authority in legislative matters pertaining to the District, subject to the prohibitions contained in the Constitution.

That act of July 16, 1790, provided for the establishment of a seat of government in the District of Columbia. On February 21, 1871, Congress created of the District a municipal corporation by the name of "the District of Columbia," with power to sue, be sued, contract, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution, the laws of the United States, and the provisions of this act.

Subsequently, on June 11, 1878, the organic act of the District of Columbia was enacted by Congress, which provides that the District of Columbia shall remain and continue a municipal corporation as provided in section 2 of the Revised Statutes relating to said District, and that the commissioners provided for should be deemed and taken as officers of such corporation.

This seems to be as clear as language can express it that thereafter the District of Columbia should enjoy a municipal corporate status and that its officer should be deemed and taken as officers of such corporation. The fact that Congress retains legislative authority and that the method of appointing Federal officers was followed in the appointment of the commissioners is not material and certainly not controlling, for the selection of the commissioners could have been delegated to the President alone or to the people of the District. Had it been the intent of Congress that the commissioners should enjoy the status of Federal officials then no expression thereon was necessary, but the fact that Congress in specific words gave them the status of municipal officers indicates clearly that Congress was making and did make a distinction as to the official status of these officers while, at the same time, retaining the Federal method of appointment.

This was a very reasonable provision for, while these officials are appointed by the President and confirmed by the Senate, they are not paid in the same manner as Federal officers. They are paid out of the District funds, to which, it is true, the Government contributes a certain sum, but they are not paid out of the Federal Treasury as are officials of the Federal Government.

For the reasons stated, it is our conclusion that Frederick A. Fenning is an officer of a municipal corporation, to wit, the District of Columbia, and as such is not a civil officer of the United States and as such is not subject to impeachment.

The report then discusses seriatim the charges filed, and finds in each case insufficient evidence to support the allegation.

In concluding, however, the committee find that the evidence adduced in the course of the hearings discloses practices "illegal and contrary to law," neglect of duty, and conditions "which can not be too severely criticized and condemned" and recommend an investigation by a "proper committee of Congress."

Seven minority views filed by nine members of the committee disagree with the findings of the majority as to proof of various charges but with the exception of two concur in the opinion that a Commis-

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sioner of the District of Columbia is not a civil officer subject to impeachment within the meaning of the Constitution.

Congress adjourned on July 3,[72] and in the interim Frederick A. Fenning tendered his resignation as Commissioner of the District of Columbia.

549. The inquiry into the conduct of Judge Frank Cooper, in 1927.

In instituting impeachment proceedings it is necessary first to present the charges on which the proposal is based.

Articles of impeachment having been presented, debate is in order only on debatable motions related thereto.

A motion to refer impeachment charges was entertained as a matter of constitutional privilege.

The proponent of a proposition to refer impeachment charges to a committee is entitled to one hour in debate exclusive of the time required for the reading of the charges.

The motion to refer is debatable in narrow limits only and does not admit discussion of the merits of the proposition sought to be referred.

Propositions relating to impeachment are privileged and a resolution authorizing the taking of testimony and defrayment of expenses of investigations in connection with impeachment proceedings was entertained as privileged.

On January 28, 1927,[73] Mr. Fiorello H. LaGuardia, of New York, rising to a question of high privilege, proposed to impeach Judge Frank Cooper, United States district judge of the Northern District of New York. After he had proceeded for some time in debate, Mr. Thomas L. Blanton, of Texas, made the point of order that he was not entitled to the floor, not having presented formal articles of impeachment.

The Speaker [74] sustained the point of order and said:

> The Chair thinks the gentleman from New York should make his charges. The Chair understood he was simply leading up to the charges. But if a point of order is made, the gentleman is bound to state his charges.

Mr. LaGuardia presented formal charges in writing and was again proceeding in debate when Mr. Leonidas C. Dyer, of Missouri, raised the further point of order that impeachment charges were not debatable except in connection with some admissible and debatable motion relating thereto.

The Speaker said:

> The Chair would think that the proper procedure would be to introduce the motion or resolution and then it would be proper.

Mr. LaGuardia moved to refer the charges to the Committee on the Judiciary and was again proceeding in debate when Mr. Louis C. Cramton, of Michigan, interposed the point of order that having secured the floor on a motion to refer, it was not in order to discuss the merits of the propositions sought to be referred.

The Speaker sustained the point of order and said:

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[72] Second session Sixty-ninth Congress, Record, p. 3723.
[73] Second session Sixty-ninth Congress, Record, p. 2487.
[74] Nicholas Longworth, of Ohio, Speaker.

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The Chair thinks that under the motion to refer the gentleman from New York would be limited to a discussion of the reasons why these charges should or should not be referred to the Committee on the Judiciary.

The precedent to which the Chair will call attention is this:

"The simple motion to refer is debatable within narrow limits, but the merits of the proposition which it is proposed to refer may not be brought into the debate."

Under that the Chair would think the gentleman from New York would be confined to a discussion of the reasons why the resolution should be referred to the Committee on the Judiciary.

The gentleman from New York ought not to argue the merits of the case to the House. That is what will be argued before the Committee on the Judiciary, but the gentleman may argue to the House the merits of his motion, to wit, whether this matter should or should not be referred to the Committee on the Judiciary.

After further debate, Mr. Cramton submitted a parliamentary inquiry as to whether the time consumed in reading the charges should be taken from the hour allotted to the proponent of the motion to refer the charges.

The Speaker held:

No; the Chair would think not. The Chair would think that on his motion to refer, the gentleman is entitled to one hour.

The time taken to read the charges was simply time taken to inform the House of the matter before it, such as time taken by the clerk to read a bill. Now, the gentleman from New York makes a motion to refer, and under the rules of the House a motion to refer is debatable for one hour.

The gentleman did not present his case by way of argument. The gentleman read a series of charges, obtaining the floor as a matter of privilege. The reading of those charges was simply to give the House information—not argument, but information. The Chair held, in ruling on the point of order raised by the gentleman from Texas, that the gentleman from New York must read his charges before making any argument. Having now read his charges, the gentleman from New York moves to refer the charges to the Committee on the Judiciary, and under the rules of the House the gentleman is entitled to one hour.

The Chair overrules the point of order.

Subsequently, Mr. Cramton rose to the point of order that the debate was not being confined to the motion to refer.

The Speaker ruled:

The point of order has been made. The Chair thinks the gentleman from New York is going over the line of the argument and into the merits of the question instead of the merits of the motion to refer. The Chair in cases like this is always inclined to be in favor of a reasonable debate, but the Chair thinks that the line of argument which is being made now by the gentleman from New York goes more to the merits of the case than to the merits of the motion. The gentleman will proceed in order.

Debate having been concluded, the motion was agreed to and the charges were referred to the Committee on the Judiciary.

On February 11,[75] Mr. George S. Graham, of Pennsylvania, from that committee submitted the following resolution:

Resolved, That the Committee on the Judiciary, and any subcommittee that it may create or appoint, is hereby authorized and empowered to act by itself or its subcommittee to hold meetings and to issue subpoenas for persons and papers, to administer the customary oaths to witnesses, and to sit during the sessions of the House until the inquiry into the charges against Hon. Frank Cooper, United States district judge for the northern district of New York is completed, and to report to this House.

That said committee be, and the same is hereby, authorized to appoint such clerical assistance as they may deem necessary, and all expenses incurred by said

[75] Record, p. 3525.

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committee or subcommittee shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee and signed by the chairman of said committee.

In response to a parliamentary inquiry from Mr. Blanton, as to the privilege of the resolution, the Speaker said:

It is privileged because it relates to impeachment proceedings.

Mr. Graham submitted the report of the committee on March 3,[76] as follows:

The committee has examined into the charges agianst Hon. Frank Cooper, United States district judge for the northern district of New York, made on the floor of the House and referred to it by the House on the 28th day of January, 1927 (Cong. Rec. pp. 2487–2493), and has heard all witnesses tendered by accuser and accused and reports to the House the oral and documentary evidence submitted, and while certain activities of the Hon. Frank Cooper with relation to the manner of procuring evidence in cases which would come before him for trial are not to be considered as approved by this report, it has reached the conclusion and finds that the evidence does not call for the interposition of the constitutional powers of the House with regard to impeachment. The committee, therefore, recommends the adoption of the following resolution:

"*Resolved*, That the evidence submitted to the Committee on the Judiciary in regard to the conduct of Hon. Frank Cooper, United States district judge for the northern district of New York, does not call for the interposition of the constitutional powers of the House with regard to impeachment."

The report was agreed to by the House without division.

550. The inquiry into the conduct of Francis A. Winslow, judge of the southern district of New York, in 1929.

Discussion of methods of authorizing an investigation with a view to impeachment.

Instance wherein a special committee was created for the purpose of instituting an inquiry and drafting articles of impeachment if found to be warranted by the circumstances.

Instance wherein a special committee of investigation was authorized to sit after adjournment of the current Congress and report to the succeeding Congress.

A special committee having been created to investigate charges, a member supplemented the proceedings by rising to a question of privilege in the House and proposing impeachment.

A judge whose conduct was under investigation having resigned, no further action was taken by the committee charged with the investigation.

A judge against whom impeachment proceedings were instituted refrained from the exercise of judicial functions from the date of the filing of the charges.

On February 12, 1929,[77] during consideration of the legislative appropriation bill in the Committee of the Whole House on the state of the Union, Mr. Fiorello H. LaGuardia, of New York, having been yielded time for debate said:

Mr. Chairman and members of the committee, at times it becomes necessary for a Member of the House to invoke the machinery provided in the rules of the House to ascertain whether or not a judge of the Federal court has been guilty of crimes and misdemeanors to warrant his impeachment. We have a situation in the southern district of New York so bad that it has shocked both the bench and the bar; so bad that it is reflecting on the integrity of that court; and unless

[76] Record, p. 5619.
[77] Second session Seventieth Congress, Record, p. 3334.

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we have an investigation either to ascertain the truth of these charges or otherwise, the people of that district will lose confidence in that court.

With the permission of the House I will read the resolution which I am now introducing:

Mr. LaGuardia then read from a written memorandum of specific charges and an appended resolution authorizing an investigation.

The resolution with the accompanying charges was later delivered to the Clerk and was referred by the Speaker to the Committee on the Judiciary.

On February 18, Mr. George S. Graham of Pennsylvania, submitted a report from the Committee on the Judiciary recommending the passage of the following joint resolution:

Whereas certain statements against Francis A. Winslow, United States district judge for the southern district of New York, have been transmitted by the Speaker of the House of Representatives to the Judiciary Committee: Therefore be it

Resolved, That Leonidas C. Dyer, Charles A. Christopherson, Andrew J. Hickey, George R. Stobbs, Hatton W. Sumners, Andrew J. Montague, and Fred H. Dominick, being a subcommittee of the Committee on the Judiciary of the House of Representatives, be, and they are hereby, authorized and directed to inquire into the official conduct of Francis A. Winslow, United States district judge for the southern district of New York, and to report to the House whether in their opinion the said Francis A. Winslow has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House until adjournment sine die of the Seventieth Congress and thereafter until said inquiry is completed, and report to the Seventy-first Congress.

SEC. 2. That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary, and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by this resolution shall not exceed the sum of $5,000.

Mr. Bertrand H. Snell, of New York, questioned the method of procedure on the grounds that under the rules a proposition for the creation of a special committee of investigation would come regularly within of a special committee of investigation would come regularly within impeachment was contemplated the matter should follow precedent and go direct to the Committee on the Judiciary.

Mr. Graham replied:

Mr. Speaker, this will not set up a special investigating committee. This resolution is exactly the same as was passed by this House under exactly similar circumstances in the English case. On the strength of that resolution the committee in the English case charged with the duty of investigating was able to subpoena witnesses and proceed in a regular and orderly way to ascertain whether or not the charges that had been made on the floor of the House were well founded. In the English case exactly the same procedure was followed. The House referred the resolutions to the Committee on the Judiciary.

They made a preliminary examination, which was a preliminary step in the procedure. That committee heard any witnesses that were willing to appear before the committee. They had no power to compel anyone to appear before the committee. We have not the right, unless the House gives it to us, to subpoena witnesses and call on them to testify under oath. That authority being given, and the committee, recognizing that it was proceeding under the Congress and that the Congress would die on the 4th of March succeeding, took charge and

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this investigation was started but, of course, would die with the Congress. A resolution exactly the same as this was adopted by the House for two purposes, first, to give the committee power to make an investigation, and, second, to give the committee all the necessary machinery and prolong its life beyond the period of its extinction through the adjournment of the Congress.

Now, then, in addition to that the committee was instructed to report back to the House. That meant through the regular channels, which would be by the subcommittee of the Committee on the Judiciary reporting to that body, and to the House. This subcommittee was not a special investigating committee.

Now, I want to say on the general principle that if this were the rule of the House then these resolutions ought not to have been referred to us. They ought to have been referred in the first instance to the Committee on Rules. I want to say to my friends of the House and everybody that such a procedure as this will be marked with regret by those who assent to it making it the practice of the House. Whenever a man on the floor of the House presents such statements as cloud the reputation and standing of a judge of the district court of the United States he puts against that man what is equivalent to impeachment. I care not by what name you call it, impeachment or charges, it is an impeachment of the integrity and mars the usefulness of the judge himself. The matter ought to be proceeded with. It will be a sad day when these matters have first to go to the Committee on Rules where it would be said by the public it was only a subterfuge to delay a procedure which was started by charges made on the floor of the House.

After further debate Mr. Graham offered the following amendment:

To sit during the sessions of the House until adjournment sine die of the Seventieth Congress, and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House of the Seventy-first Congress.

The amendment was agreed to and the joint resolution as amended was adopted by the House, and on February 23,[78] was agreed to by the Senate.

On March 2, Mr. LaGuardia, rising to a question of high privilege in the House, formally proposed the impeachment of Francis A. Winslow and submitted 12 specific charges accompanied by a resolution as follows:

Resolved, That Francis A. Winslow, United States district judge for the southern district of New York be impeached of high crimes and misdemeanors in office as hereinbelow in part specifically set forth.

The Speaker referred the resolution to the Committee on the Judiciary.

The subcommittee created by the joint resolution designated April 1 for the opening of the inquiry and notified Judge Winslow who on that day tendered his resignation to the President and issued the following statement by counsel:

Judge Winslow has felt, from the time the charges were made against him, that his usefulness as a member of the judiciary was thereby impaired, and he has since refrained from appearing as a judge. The same belief is still uppermost in his mind. In the interval, the charges directed against him in Congress have been made the subject of inquiry by the grand jury in New York.

Also, since the presentment of the grand jury was made, proceedings have been instituted and concluded against certain of those whose names have been associated with his in the complaints. These several proceedings having ended, Judge Winslow finds that he now has to consider the future of his relations to the bench in the light of his own sense of duty. He can not but realize, notwithstanding the failure to impugn his personal integrity, that the prestige of the court would be impaired should he return to it, and this he could not for himself endure, nor could he allow it to continue as an embarrassment to the other judges.

The resignation was accepted by the President on the day on which received and the committee discontinued the investigation.

[78] Record, p. 4123.

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Notwithstanding the resignation, Mr. LaGuardia again preferred the charges by resolution on the convening of the Seventy-first Congress.[79] The resolution was referred to the Committee on the Judiciary which made no report thereon.

551. The inquiry into the conduct of Harry B. Anderson, judge of the western district of Tennessee, in 1930.

Charges having been preferred by a Member of the House, the committee to which the matter was referred reported a resolution providing for the creation of a special committee of investigation.

On March 12, 1930,[80] Mr. Fiorello H. LaGuardia, of New York, filed charges against Harry B. Anderson, judge of the western district of Tennessee with a view to the institution of proceedings for impeachment.

The charges and the accompanying resolution were referred by the Speaker to the Committee on the Judiciary which, on June 13,[81] reported to the House the following resolution which was agreed to:

Resolved, That a special committee of five Members of the House of Representatives who are members of the Committee on the Judiciary of the House, be, and is hereby authorized and directed to inquire into the official conduct of Harry B. Anderson, United States district judge for the western district of Tennessee, and to report to the Committee on the Judiciary of the House whether in their opinion the said Harry B. Anderson has been guilty of any acts which in contemplation of the Constitution are high crimes or misdemeanors requiring the interposition of the constitutional powers of the House; and that the said special committee have power to hold meetings in the city of Washington, D.C., and elsewhere, and to send for persons and papers, to administer the customary oaths to witnesses, all process to be signed by the Clerk of the House of Representatives under its seal and be served by the Sergeant at Arms of the House or his special messenger; to sit during the sessions of the House and until adjournment of the second session of the Seventy-first Congress and thereafter until said inquiry is completed, and report to the Committee on the Judiciary of the House; and be it further

Resolved, That said special committee be, and the same is hereby, authorized to employ such stenographic, clerical, and other assistance as they may deem necessary; and all expenses incurred by said special committee, including the expenses of such committee when sitting in or outside the District of Columbia, shall be paid out of the contingent fund of the House of Representatives on vouchers ordered by said committee, signed by the chairman of said committee: *Provided, however*, That the total expenditures authorized by the resolution shall not exceed the sum of $5,000.

552. The inquiry into the conduct of Grover M. Moscowitz, judge for the eastern district of New York, in 1930.

An instance wherein impeachment proceedings were set in motion by memorials filed with the Speaker and by him transmitted to a committee of the House.

A committee of the House having conducted a preliminary inquiry, a special subcommittee was by joint resolution created to further investigate the case with a view to impeachment.

A vacancy on a special committee created by joint resolution was filled by a further joint resolution.

The committee while criticizing the official conduct of a judge failed to find facts sufficient to warrant impeachment.

On February 27, 1929,[82] the Committee on the Judiciary, in response to certain memorials filed with the Speaker and by him referred to the committee, reported a joint resolution creating a special subcommittee

[79] First session Seventy-first Congress, Record, p. 33.
[80] Second session Seventy-first Congress, Record, p. 5105.
[81] Record, p. 11097 tem.
[82] Second session Seventieth Congress, Record, p. 4610.

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of the Committee on the Judiciary to inquire in to the official conduct of Grover M. Moscowitz, judge for the eastern district of New York. with authority to sit after adjournment of the Seventieth Congress and report to the Seventy-first Congress.

The resolution was agreed to by the Senate on March 1,[83] and was thereafter supplemented by a further joint resolution [84] filling a vacancy on the subcommittee.

The report [85] of the Committee on the Judiciary submitted by Mr. George S. Graham, of Pennsylvania, for the committee, on April 8,[86] thus explains the inception of the proceedings:

This investigation had its origin in a letter addressed to the Speaker of the House of Representatives by Representative Andrew L. Somers, of the sixth New York District, transmitting to the Speaker a statement made by Sidney Levine and Joseph Levine, also some correspondence submitted by J. C. Rochester Co. (Inc.), charging misconduct on the part of Judge Grover M. Moscowitz.

The Speaker of the House referred the matter to the Committee on the Judiciary, and owing to the face that the Seventieth Congress was about to expire, House Joint Resolution 431 was presented by the chairman of the Committee on the Judiciary for the purpose of giving vitality to a subcommittee that might make an investigation during the recess and report to the Judiciary Committee in the next Congress.

The Committee finds grounds for severe criticism and the report recites:

After seeing the witnesses, hearing them testify, and with due regard to the argument of counsel and all of the evidence in the case, individual members of this committee do not approve each and every act of Judge Moscowitz concerning which evidence was introduced. For example, the committee can not and does not indorse a business arrangement of Judge Moscowitz with his former partner which continued after Judge Moscowitz became a district judge, especially when he was appointing members of the legal firm to which this former partner belonged to various receiverships in his court. While this committee finds nothing corrupt in these transactions, yet this procedure throws the court open to criticism and misunderstanding by the uninformed, as has happenen in this case; and, therefore, this committee can not and does not indorse this practice.

The Committee, however, concluded:

Nevertheless, after a careful consideration of all the evidence in the case, and giving full consideration to the problems and persons with which the court had to deal, this committee is unanimous in its opinion that sufficient facts have not been presented or adduced to warrant the interposition of the constitutional powers of impeachment by the House.

The House accordingly approved the report and—

Resolved, That the House of Representatives hereby adopts the report of the Committee on the Judiciary relative to the charges filed against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York; and further

Resolved, That no further action be taken by the House with reference to the charges heretofore filed with the committee against Hon. Grover M. Moscowitz, United States district judge for the eastern district of New York.

[83] Record, p. 4839.
[84] Record, p. 5015, 5068.
[85] House Report No. 1106.
[86] Record, p. 6992.

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